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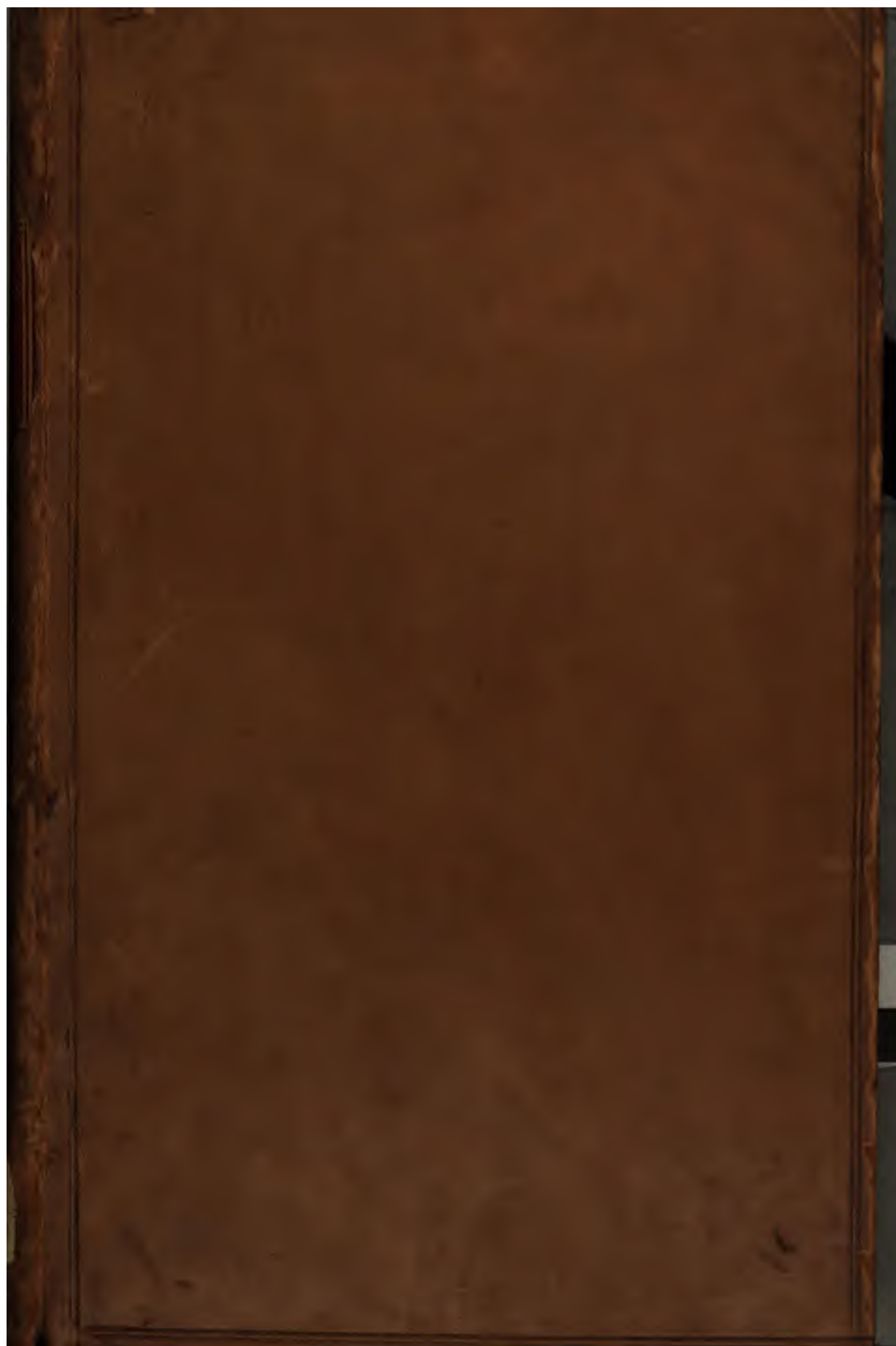
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A
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OF THE
LAW OF ACTIONS AND TRIALS
AT
NISI PRIUS.

VOL. II.

A
D I G E S T
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at
Risi Prius.

BY
ISAAC 'ESPINASSE,
OF GRAY'S INN, ESQ. BARRISTER AT LAW.

THE FOURTH EDITION, CORRECTED,
With considerable ADDITIONS
From PRINTED and MANUSCRIPT CASES.

Et spes et ratio Studiorum.

JUV.

IN TWO VOLUMES.
VOL. II.

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1812.

DIGEST

OF THE

LAW OF AGRICULTURE AND LIVESTOCK

IN

THE STATE OF NEW YORK

BY

JOHN C. BENTLEY

ATTORNEY AT LAW

THE STATE OF NEW YORK

IN SENATE

REPORT

1891

OF THE

IN SENATE



THE

REPORT

OF THE

1891

CHAPTER X.

The Action of Slander.

SLANDER is the defaming a man in his reputation, by speaking or writing, or the rendering him an object of ridicule, from whence any injury in character or property or feeling arises, or may arise, to him.

Slander may be committed, 1st, By *words*: 2dly, By *writing*, which is called, by *libel in scriptis*: 3dly, By *pictures*, or representations of that sort, which is called *libel sine scriptis*. Case de Libellis
Famcis,
5 Co. 125.

In treating of this action I shall first consider each species of slander now laid down in its order, and the rules of construction adopted by the courts: 2d, The pleadings: 3d, The verdict, judgment, and costs.

I. OF SLANDER BY WORDS.

Words for which this action may be maintained are, either such as are in themselves actionable, or such as become so by reason of some special damage arising from them.

1st, OF WORDS IN THEMSELVES ACTIONABLE.

These are, 1st, Which bring a man into any danger of legal punishment: as to say, "That he poisoned another:" 2dly, Which may operate to exclude a man from society; as to say, "That he hath an infectious disease:" 3dly, Which injure a man in his trade or profession; as to call a *trader a bankrupt*: 4thly, Which charge a man in a public capacity or office with principles inconsistent with his office; as to say of a *justice of peace*, "That he was a Jacobite, and for bringing in the pretender."

I. OF WORDS ACTIONABLE, FROM THEIR BRINGING THE PERSON OF WHOM THEY ARE SPOKEN TO THE DANGER OF LEGAL PUNISHMENT.

1. "These words must charge a *fact to have been committed*; for to charge a man with *bad or evil intentions*, is not sufficient."

As where the defendant said of the plaintiff, "He is a brawler and quarreller, and gave his champion counsel to kill me, and then fly the country;" these words were adjudged not to be actionable, for they charge no fact committed, and the purpose, or intentions of a man without action are not punishable by law. Eaton v. Allen,
4 Co. 16. b.

So where the words were "He is a troublesome fellow, and I doubt not to see him indicted at the next assizes for sheep-stealing;" Bland's case,
Hust. 12.

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these words were adjudged not to be actionable, as not charging the party with any fact committed.

"For the words should import some degree of *guilt*."

Steward v.
Bishop,
Hutt. 2.

As to say a man is *in gaol* for stealing a horse, is not actionable; for the person might be innocent, and the words only import his being in on suspicion.

Beaver v. Hide,
2 Will. 300.

But in this case, when the words were of the same import, "he was put into the round-house for stealing ducks at *Crowland*:" the plaintiff had a verdict, and on a motion in arrest of judgment, the Court held, That he should recover, the jury having found them to be *false* and *malicious*.

"On this ground *adjective words* are actionable or not, according as they *presume an act committed or not*."

Brittridge's case
4 Co. 18. b.

As where the words laid were, "he is a *perjured old knave*:" that distinction was taken; so that if one calls another *sedition* or *thievish knave*, these words are not actionable, for they only import an inclination to sedition or theft, not that the party ever was guilty of either; but the word *perjured* imports an act committed, and so is actionable.

"So they may be actionable according to the application of them, or allusion to the circumstances under which they were spoken."

Holt v. Scholefield,
6 T. Rep. 691.

As where the words were of a person "That he was *forsworn*."—These words would be actionable if applied to a swearing in a judicial proceeding, but otherwise if spoken without any allusion to it:—and on that ground where the words were laid *generally* without any colloquium respecting legal proceedings, the Court held, That they were not actionable, and there being a general verdict, arrested the judgment.

Finch's Law,
186.

2. "It is not necessary to make words actionable under this "head, that they *endanger the person's life*, or charge him with "felony, for to charge him with any lesser crime, for which he is "liable to prosecution, is actionable: as to say he hath gone about "to get poison to kill the child that such a woman goeth with " (which is no felony) yet these words are actionable."

Morgan v.
Williams,
1 Stra. 142.

So where the words were, "You are a thief—Of what? Of every thing:" these were held to be actionable, though the theft might be of what was no felony; as apples from a tree; for that the Court would intend it to be of every thing of which he could be a thief.

Cuddington v.
Wilkins,
Hob. 81.

And note, That where a person had been a thief, but a general pardon of all felonies had passed, of which he had taken the benefit, and a person afterwards called him "Thief;" the words were held to be actionable, he being cleared of all guilt by the pardon.

3. "Words should be taken with reference to the subject matter "in allusion to which they were spoken—as in such case words "actionable *prima facie* in themselves may by reference to that of "which they were spoken not be actionable."

Christie v.
Cowell,
Peake N. P. Cas.

As where the words were, "He is a thief, for he has stole my beer." The defendant was a brewer, and the plaintiff lived with him as his servant, and the words were spoken alluding to several sums of money received by the plaintiff in that capacity from the defendant's

defendant's customers for which he had not accounted. Lord *Kenyon* desired the jury to consider whether the words alluded to the mere breach of trust, or to an actual stealing of the beer; as in the first case they were not actionable, but otherwise in the latter. The jury found for the defendant.

4. "Though the words may import a charge of felony, yet if it appears that the fact charged could not have happened, this action will not lie."

As the plaintiff declared that the defendant, *having a wife then living*, said of the plaintiff, "He has killed my wife; he is a traitor:" on demurrer the words were adjudged not to be actionable, for that the wife being living, the plaintiff could never be brought into danger; and so the words were vain, and no scandal.

Snag v. Gee,
4 Co. 16. a.

The second class of actionable words are,

2. WORDS WHICH OPERATE TO EXCLUDE A MAN FROM SOCIETY.

As to say of a man that "He is a leper, or hath got the leprosy," is actionable; for "a leper" shall be removed from the society of men by a writ *de leproso amovendo*. 1 Roll. Abr. 44.

So where the words were, "He is full of the pox; I marvel that you will eat with him:" these words were adjudged to be actionable.

Taylor v. Packins,
Hil. 4 Jac. B. R.
Cruttal v. Horner,
Hob. 279.
James v. Rutledge,
4 Co. 17. a.
Carlisle v. Mapledoram,
2 T. Rep. 473.

But the words must charge the person with having such disorder at the time of speaking the words; for if not, the words do not operate to exclude the person from society: as "the bath given the bad disorder to several," is not actionable, as not spoken in the present tense.

So where the words were "That he *had had* the pox;" they were held not to be actionable; for it is avoiding him for fear of contagion, and refusing to keep him company, that is the legal notion of damage; and when he is cured, these inconveniences will not attend him; and for that judgment was arrested.

Taylor v. Hall,
2 Stra. 1189.

The third class of words in themselves actionable are,

3. WORDS WHICH INJURE A MAN IN HIS TRADE OR PROFESSION.

1. As where the words were spoken of an attorney, "What, does he pretend to be a lawyer? He is no more a lawyer than a devil:" these words, as scandalizing him in his profession, were adjudged to be actionable.

Day v. Buller,
3 Will. 59.

So if one says of a merchant, "He is a bankruptly knave," or "That he will be a bankrupt within two days," or such like imputations, these words are actionable.

4 Co. 19. a.

"And words tantamount, as conveying implied slander, shall be deemed actionable."

As where the words were, "You are a forry fellow and a rogue, and compounded your debts for five shillings in the pound:" these were held to be actionable when spoken of a trader, being tantamount to calling him *bankrupt*.

Stanton v. Smith,
2 Stra. 762.

2. "When words are used to any person which are applicable

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"to his profession or calling, and tend to scandalize it, they shall be taken as applying to it, and be actionable."

Byrchley's case,
4 Co. 16.

As where *Byrchley*, the plaintiff, being one of the attornies or clerks in the court of *B. R.* and sworn to deal duly without corruption in his office, the defendant speaking of the plaintiff's manner of dealing in his profession, said to *Byrchley*, "You are well known to be a corrupt man, and deal corruptly:" these words were adjudged to be actionable, as slandering him in his profession, to which the words referred; for *sermo relatus ad personam, intelligi debet conditione personæ*.

The last species of words in themselves actionable are,

4. WORDS SPOKEN IN DEROGATION OF A PERSON IN ANY OFFICE OF DIGNITY, TRUST, OR PROFIT;

As public officers, magistrates, &c. Under which head may be considered, *scandalum magnatum*, or slander of peers, or other eminent persons.

1. "With regard to this head it is to be observed, that words may be actionable with regard to these, which would not be held so in the case of a common person."

Proby v. Marq. of Dorchester,
1 Sid. 233.

As where the words were used of the Marquis of *Dorchester*, "My lord is no more to be valued than the dog that lies there:" these words were held to be actionable.

"So in the case of a common person, words importing merely *bad inclinations*, are not actionable (*ante* 1.); but it is otherwise in the case of *public persons or magistrates*."

How v. Prim,
Salk. 694.

For where the plaintiff declared, that being a *justice of peace* and *deputy-lieutenant*, and having served as knight of the shire for the county of *Gloucester*, and intending to stand candidate for it again, the defendant said of him, "He is a Jacobite, and for bringing in the pretender and popery to destroy our nation:" these words, which only charged inclinations and principles, were held to be actionable.

Aston v. Blagrave,
1 Stra. 617.
2 Lord Raym.
1369. 8. C.

So where the words were spoken of the plaintiff, who was a *justice of peace*, "He is a rascal, a villain, and a liar;" they were held to be actionable when applied to a person in an office of trust or dignity.

Stuckley v. Bulhead,
4 Co. 16. 2.

So where the words were spoken of *Stuckley*, who was a justice of peace for *Devonshire*, "*Stuckley* covereth and hideth felonies, and is not worthy to be a justice of peace;" the plaintiff recovered, for it was against his oath and office, and a good cause to put him out of the commission, and indict and fine him.

2. "But where the words do not charge the person in such trust or office, with any breach of his duty or oath, with any crime or misdemeanor, whereby he has suffered any temporal loss in fortune, office, or any way whatsoever, but are spoken as *matter of opinion* as to such person's conduct, such words are not actionable."

Onslow v. Horne,
3 Will. 177.

As where the plaintiff being knight of the shire for the county of *Surry*, the defendant, at a meeting of the freeholders of the county, used the following words: "As to instructing Mr. *Onslow*, you

you might as well instruct the winds ; and should he promise his assistance, I should not expect that he would give it :” these words were adjudged not to be actionable, as charging no crime, but being merely matter of opinion ; and *per Lord Chief Justice De Grey, to impute to any man the mere defect of moral virtue, moral duty, or obligation, which renders a man obnoxious, is not actionable*, such as the present case, which is merely insinuating a doubt of Mr. Onslow’s honour.

3. But a distinction is to be observed when the words are used *Salk. 695.* to a person in an office of *profit*, and when in one of *credit* only : in *offices of profit*, words that impute either want of *understanding of ability*, or *integrity*, are actionable ; but in those of *credit*, words that impute want of *ability only* are not actionable : as to say of a justice of peace, “ He is an ass ; he is a beetle-headed justice,” is not actionable ; and the reason is that a man cannot help his want of ability ; as he may his want of honesty : but even in offices of *credit*, words that import corruption or dishonesty are actionable.

4. As to action of *scandalum magnatum*, it is enacted by stat. *West.* “ That if any one slander a peer, or other great person, he shall be punished by imprisonment ;” and by stat. 2 *Rich. 2.* “ The person injured may in a *qui tam* action recover damages for the offence.”

2. OF WORDS NOT IN THEMSELVES ACTIONABLE, BUT WHICH BECOME SO BY REASON OF SOME SPECIAL DAMAGE ; AS LOSS OF PREFERMENT, MARRIAGE, &c.

1. For the Loss of Preferment.

As if a divine is to be presented to a benefice, and one to defeat him of it, says to the patron, “ That he is an heretic, or a bastard, or that he is excommunicated ;” by which the patron refuses to present him, and he loses his preferment, he may have his action for that slander. *4 Co. 17. a.*

So where the defendant said of the plaintiff (who was son and heir of his father), “ That he was a bastard ;” an action was adjudged to lie, for it tended to disinherit him of the lands which would descend to him from his father : but it was further resolved, That if the defendant pretended that the plaintiff was a bastard, and he himself the next heir, no action lies, for it is a claim of right. *Banister v. Banister, cited 4 Co. 17.*

“ And in such case it seems not necessary that the damage arising from the words be *certain and immediate*, for if it be *probable and remote*, it will maintain the action.”

As where the action was for calling the plaintiff a bastard ; and it was moved in arrest of judgment, that he should shew some special damage from a present title and possession, whereas he had only declared that his grandfather was tenant in tail, and his father had divers sons living, of whom he was the youngest ; but there being a *possibility that he might inherit, and he proving that he had been offered a sum of money for his possibility*, the action was adjudged to lie. *Vaughan Ellis, Cro. Jac.*

2. For the Loss of Business or Trade.

Levett's case,
Cro. Eliz. 289.

As where the plaintiff declared that he was an innkeeper, and the defendant said to him, "Thy house is infected with the pox, and thy wife was laid of the pox:" these words were adjudged to be actionable; for it was a discredit to the plaintiff, and guests would not resort thither.

"But in such case it must appear that the words from whence the injury may arise, were used in a conversation concerning the plaintiff's trade or business."

Savage v.
Robbery,
Salk. 694.

For where the plaintiff declared that he was a trader, and that the defendant said to him, "You are a cheat, and have been a cheat for divers years," judgment was arrested, after a verdict for the plaintiff, it not appearing that there was a colloquium of the plaintiff's trade at the time.

Harrison v.
Shatton,
Esp. N. P. Caf.
218.

In an action for slanderous words, imputing dishonesty to the plaintiff, who was a trader, the declaration is not supported, by proving words which may import such a meaning, but are equivocal, and may have a different import.

"Though where the words must clearly refer to the plaintiff's trade or calling, they shall be actionable, though no colloquium is found."

Reeve v.
Holgate,
Lev. 62.

As where the plaintiff was a maltster and dealer in corn, and the defendant said of him, "Don't deal with him, he's a cheat, and has cheated all the farmers at Epping, and dares not shew his face there, and now is come to cheat at Hatfield:" these words evidently referring to the plaintiff's trade, were held to be actionable, though the special verdict which found them, found also no colloquium of the plaintiff's trade.

3. For Loss of Marriage.

Davis v.
Gardiner,
4 Co. 16. b.
Poph. 76. S. C.

As where the plaintiff declared, that she being a virgin of good fame, was going to be married to one Antony Elcock, and that the defendant said of her, "I know Davis's daughter, she dwelt in Cheapside, and there was a grocer that did get her with child:" by reason of which words the said Elcock refused to marry her; the plaintiff recovered, on account of the special damage.

Holwood v.
Hopkins,
Cro. Eliz. 787.

But in this case a distinction is taken, that in order to make such words actionable, they must be spoken to the person who was in communication to have married the person who was defamed, for if spoken generally the action will not lie; for to call a woman whore, or words tantamount, is a matter of spiritual cognizance, and not actionable at common law, unless under the circumstances above. Sed Q.?

Graves v.
Blanchet,
Salk. 699.
Id. 694. S. P.

4. For the Loss of Service.

Per Lord Mans-
field.
Bull. N. P. 8.

As if a person to prevent a servant from getting a place gives him a false character, it is actionable.

But

But in such case it must appear to have been given *maliciously, and with an ill intention*; for though the character given is *false*, yet if no malice appears, the action will not lie.

Weatherstone
v. Hawkins,
Hil. 26 G. 3.
1 T. Rep. 110.

5. *Per Heath, Justice, 1 Taunt. 44.* "All words are actionable if a special damage follow."

Therefore where the words imputed incontinence to the plaintiff, the damage laid was, *by which she lost the entertainment and hospitality of her friends, and by reason of which they refused to find and provide for her meat and drink*, this was held to be sufficient to support the action.

Moore v.
Meager,
1 Taunt. 39.

3. "But it is to be observed, that words which would otherwise of themselves be actionable may nevertheless not bear an action, from the particular circumstances under which they are spoken or used."

1. *As if words are spoken out of a motive of friendship, and without intention to defame.*

As where the action was for saying of the plaintiff, who was a tradesman, "He cannot stand it long, he will be a bankrupt soon," and special damage was laid in the declaration, viz. "That one Lane refused to trust the plaintiff for an horse:" Lane, the person named in the declaration, was the only witness called for the plaintiff; and it appeared from his evidence, that the words were *not spoken maliciously*, but in confidence and out of friendship to Lane, and only by way of friendly warning to the defendant not to trust the plaintiff for the horse; Pratt Chief Just. directed the jury, That though the words were actionable, yet that if they should be of opinion that they were not spoken out of malice, but in the manner before-mentioned, that they ought to find the defendant not guilty; and they did so accordingly.

Herv. v.
Dowson,
Sittings after
Trin. 5 G. 3.
Bull. N. P. 8.

2. "If they are spoken *privately, and in confidence.*"

As where a servant brought an action against her former mistress, for saying to a person who came to inquire her character, "That she was faucy and impertinent, and often lay out of her own bed, but that she was a clean girl, and did her work well:" though the plaintiff proved that she was by this means prevented from getting a place, yet *per Lord Mansfield*, this is not to be considered as an action in the common way for defamation by words, but *the gist of it must be malice*, which is not implied from the occasion of speaking, but should be directly proved: *this was a confidential declaration*, and ought not to have been disclosed.

Stephenson
& ux.
Sittings after
East. 6 G. 3.
Bull. N. P. 8.

3. "If the words have been used in the course of legal proceedings, no action will lie for them."

As was adjudged in this case, that if *one exhibits articles of peace against any person containing divers great abuses, and misdemeanors, in order to have him bound to his good behaviour*, the party accused shall not have for any matter contained in such articles any action on the case, for the person has pursued the due course of justice; and if those actions were permitted, those who have just cause of complaint would not dare to complain, for fear of vexation.

Cutler v. Dixon,
Co. Rep. 146.

"But though the defendant may in such case be justified, yet if he does *not confine himself to legal form, but charges crimes not properly cognizable by that jurisdiction to which he applies*, an action will lie for those charges."

Buckley v.
Wood,
4 Co. 14. b.
Cro. Eliz. 230.
§, C.

As where *Wood*, the defendant in this action, had exhibited articles in the *Star-Chamber* against Sir R. *Buckley*, and in them, *charged several matters not cognizable in that court*, and had often *declared in the country that the articles exhibited were true*, it was resolved, 1st, That for any matter contained the bill which was examinable in that court, no action lay though it was false, because it was in the course of justice: but, 2dly, That for the matters not cognizable in that court, the action lay, as being a slander on a person which he could not defend: 3d, That though for preferring false matter to a competent jurisdiction, no action lies, yet *that if he talks at large in the country, and avers his charges to be true*, an action lies.

S. C.

It was further held in this case, That if a witness goes beyond the point in issue, and slanders a third person, this action lies against him.

Bull. N. P. 5.

Note, That if two persons say the same words, yet a *joint action* of slander will not lie against them.

2. OF SLANDER BY WRITING, OR LIBEL.

Under this head I shall consider, 1st, The nature of libels:
2. What constitutes the offence, and who are liable to punishment for them.

1. OF THE NATURE OF LIBELS.

Slander by libel differs only from slander by words, that it is delivered *in writing or printing*; but the offence of a libel is more heinous, as its circulation of the slander is more extensive, and derives too an additional degree of malignity from its being done premeditatedly.

The rules, therefore, before laid down in respect to slander by words, will be found to apply equally in the case of libels: which I shall first consider: and secondly, The more particular nature of libels themselves.

2 Will. 484.

"But there is this difference between words spoken and written, that for words written an action may be maintained as libellous, for which, if spoken, no action would lie."

Bell v. Stone,
1 Bos. & Pull.
331.

As calling a person a villain in a letter, was held to be libellous, and actionable, though it would be otherwise if a person was called so by words.

Vide et Sir John Austin v. Colepeper, 2 Show. 313.

As, 1st, "To charge a person with any crime which may subject him to the danger of legal punishment, is a libel, and actionable."

Bull. N. P. 9.

As to charge a person with sodomitical practices.

2. "To allege any matter which may be the means of excluding him from society."

Villers v.
Monby,
2 Will. 403.

As where the plaintiff brought his action against the defendant for a libel, charging him, in a ludicrous copy of verses, *with having the itch, and sinking of brimstone*; the plaintiff recovered in this action,

SLANDER.

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action, the words charging him with diseases which rendered him unfit for society.

3. "So where the writing is such as *will injure a man in his trade or profession*, it is a libel for which this action lies."

Harman v. Delany,
2 Stra. 898.
Fitzgib. 122.
S. C.

As where the plaintiff declared, That he was gun-maker to the Prince of *Wales*, and it having been inserted in the newspapers that he had presented a gun to the Prince of *Wales* two feet six inches long, which would carry as far as one a foot longer; the defendant intending to injure him in his trade, had published another paragraph in the newspapers, mentioning this circumstance, and adding, "That he advised all gentlemen to be cautious of dealing with him, as he would not engage with any artist in town, nor did ever make such experiment (except out of a leather gun) as any gentleman might be satisfied at the *Cross-guns, Long-acre*:" this advertisement tending to injure the plaintiff's reputation as an artist, was adjudged to be actionable, though it was agreed, that for one tradesman to pretend to more skill than another, would not be so.

4. "So where the writing injures the domestic peace and happiness of a family, charging a man's children with immorality or incontinence."

Rex v. Benfield and Saunders,
2 Burr. 980.

As here writing a song and finging it about the town, that the prosecutor's daughter was of loose manners, and had gone up to *London* to be delivered of a bastard, it was held to be libellous; and defendant found guilty.

"And any thing written and published which throws contempt on a party, is actionable, without shewing or proving special damage."

Bell v. Stone,
1 Bof. & Pull.
331.

As in this case, a letter sent to a third person, reflecting on the character of the plaintiff, was held actionable, without proving special damage, though such was laid.

5. "But nothing shall be construed a libel which is necessary in the course of legal proceedings, and is relevant to the matter which is before the court."

Lake v. King,
1 Saund. 131.

As where the plaintiff declared, "That he being a doctor of laws, and vicar general to the bishop of *Lincoln*, the defendant had presented, and caused to be printed a *petition to parliament*, charging him with divers crimes; as extortion, oppression, and corruption in his office:" the action was held not to lie, the petition being the necessary and usual mode of complaint to parliament for any redress of grievance.

Astley, Bart. v. Younge,
2 Burr. 817.

So where the action was brought for a libel, and the offence laid was, "That the defendant, in a *certain affidavit* before the court, had said that the plaintiff in a former affidavit against the defendant had *sworn falsely*:" the Court held that the action would not lie; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceeding, that no action would lie for it.

So an action will not lie for a libel against a member of a court martial for observing on the conduct of the prosecutor as malicious

Jekyll v. Sir J. Moore.
6 Esp. N. P. 63.

Johnson v.
Evans, Clerk,
3 Esp. N. P. Caf.
32.

cious and injurious to the service, and making that part of the sentence acquitting the officer tried by such court martial.

No action is maintainable for words spoken by a party in giving charge of another to an officer, or in preferring a complaint before a magistrate.

6. "So no matter which is stated in any *memorial or petition for the redress of grievances, and addressed in the proper channel, by which such redress may be had*; that is, to the persons only who have power to give such redress, shall be deemed libellous."

Rex v. Baille,
Mich. 20 G. 3.
B. R. MSS.

As where the defendant being deputy governor of *Greenwich Hospital*, wrote a large volume, of which he also printed several copies, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital, and Lord *Sandwich* in particular, who was then First Lord of the *Admiralty*, with much asperity: he distributed the copies to the governors of the hospital only, but it did not appear that he had given a copy to any other person: on a rule for information for this as a libel, Lord *Mansfield* held, That this distribution of the copies to the persons only, who were from their situation called on to redress the grievances, and had from their situation power to do it, was not a publication sufficient to make that a libel; and he seemed to think that, whether the paper was printed or in manuscript, under these circumstances, made no difference.

"As words spoken without an intention to be made public, as in confidence or privately, are not actionable."

Peacock v.
Reynell,
2 Brownl. 151.
Case de Libellis
Famosis,
5 Co. 125.
Halliwood's
case cited,
5 Co. 125. b.

So if a person in a private letter expostulates with another on his vices, it is no libel which is actionable.

And Note, That a libel against a magistrate is a higher offence than against a private person; for it is a scandal upon government.

Therefore, if one finds a libel against a private person, he ought to destroy it, or to bring it to a magistrate; but if it is against a public person, he ought to bring it to a magistrate, that the offender may be found out.

2. As to the more particular Nature of Libels.

Hurt's case,
Trin. 12 Ann.
1 Hawk. P. C.
194.
2 Atk. 470.
S. P.

1. A defamatory writing, expressing only the initials, or one or two letters of a person's name, but in such manner as obviously, and indubitably referring to the person, and so that it would be nonsense if strained to any other meaning, is as properly a libel as if the whole name had been mentioned at large, for it would bring the utmost contempt on the law to suffer its justice to be eluded by such trifling evasions, and that a writing understood by the meanest capacity could not be so by the judge and jury.

"A writing, though with feigned names, has been construed a libel."

Per Lord
Hardwicke,
2 Atk. 470.

As was the case of Mrs. *Dodd*, who printed a letter abusing the late king, under the title of *Merriweis, Sophi of Persia*: though the whole letter was so couched in feigned names, yet the jury found the publisher guilty.

3. "A writing, though not directly charging crimes, may be a libel, as if done in a taunting or ironical manner."

As,

As, after recounting any acts of public charity by the person, to say, "You will not play the *Jew* or hypocrite," and so go on in a strain of ridicule, to insinuate that what he did proceeded from vain-glory.

Hick's case,
Hob. 215.
Poph. 139. S. C.

4. It is not material whether the libel be *true* or *false*, or whether the party against whom it is levelled is of *good* or *evil* fame; for the party grieved ought to complain for every injury done to him to the ordinary course of law, and not to have recourse to methods of redress by slanderous publications.

Cafe de Libellis
Famofis,
5 Co. 125. b.
4 Ref.

5. A writing may be a libel, though the person libelled is *dead*; for it stirs up some of the person's family to revenge this attack on his memory; and if he was a magistrate who is dead, who has been slandered, it is punishable as a slander on the government.

Cafe de Libellis
Famofis,
5 Co. 125.
2 Ref.

And where there is an information or indictment for a libel reflecting on the memory of any person deceased, the information or indictment should state, "That it was done with a design to bring the family of the deceased into contempt, to stir up the hatred of the king's subjects against them, and excite the relations to break the peace by vindicating the honour of the family;" and therefore where the indictment only stated, That the words as set forth "were to the great scandal and disgrace of the memory, reputation, and character of *G. Earl Cowper*, in contempt, &c. to the evil example, &c. and against the peace, &c." the judgment was arrested; for offences of this nature are punished by law, as tending to a breach of the peace, by provoking the friends of the deceased to acts of violence and revenge.

Rex v. Topham,
4 T. Rep. 126.

For it is necessary to be observed, that libels are punishable by *information* and *indictment*, as well as by *action*; that is, considering them as an offence against the public peace and good order of the state; and thereon is founded the distinction, that if any person is slandered by libel, *he* may have his *action* as well as an information or indictment; but a libel reflecting on a person dead, or the conduct of the king's ministers or government, *without any particular application*, is punishable only by *information* or *indictment*, as a matter of public, not of individual concern.

As was the case here, of an information against the defendant, "for publishing an advertisement, suggesting that many of His Majesty's subjects had been murdered by His Majesty's troops in *America*, and proposing a subscription for raising a sum of money for the support of their wives and children," the people of *America* then being in open rebellion to this country; the defendant was found guilty, fined, and imprisoned.

Rex v. Horne,
Cowp. 672.

"And on the same grounds, though the writing may not convey any slander against any person, yet may it be a libel, from having an *evil public tendency to corrupt the manners of the people*."

As in this case, where an infamous and obscene book, which had been published by the defendant, was, on an information, and on solemn argument, adjudged to be a libel; and he was convicted, and stood in the pillory.

Rex v. Carl,
2 Stra. 788.
Rex v. Hill,
Ibid. cit.

"So for the same reason, publications levelled against the *established religion* have been held to be libels."

As where the defendant was convicted of having published four blasphemous discourses on the miracles of our Saviour, and at-
tempting

Rex v. Wool-
ton,
2 Stra. 834.
Fitzgib. 65.
S. C.

Regina v.
Bedford,
Mich. 12 Ann.
cit. 2 Stra. 789.

Rex v. Watson
& alt.
Hil. 28 G. 3.
2 T. Rep. 199.

Rex v. White,
1 Campb. 359.

Curry v. Walver,
Esp. Caf. N. P.
456.

Rex v. Lee,
5, Esp. N. P. Caf.
123.

Rex v. Fisher,
1 Camp. 563.
S. P.

Rex v. Wright,
3 T. Rep. 293.

Stiles v. Nokes
7 East, 493.

Rex v. Hart,
1 Bl. Rep. 386.
Post. 312.

Dibdin v. Swan,
Esp. Caf. N. P.
28.

Ashley v.
Harrison,
Esp. Caf. N. P.
48.

tempting to move in arrest of judgment, the Court said they would not suffer it to be debated, whether to write against Christianity was not an offence punishable in the temporal courts at common law.

And on the similar principles of public concern, a *treatise of hereditary right* was held to be a libel, though it contained no libel upon any part of the then subsisting government.

"And in like manner, any public reflection on the administration of justice is libellous."

As where one *Hurry* having been maliciously prosecuted for perjury by the defendant *Watson*, and acquitted; and having afterwards recovered large damages for the malicious prosecution from him, the corporation of *Yarmouth*, of which he was a member, made an order in their books, voting to him 2300*l.* in consideration of the verdict against him, and declaring that it was done in consideration of his being actuated by motives of public justice, and preserving the rights of the corporation, and supporting the honour and credit of the chief magistrate: the Court held this to be a libel on their proceedings and the administration of justice, and made a rule absolute for an information against the defendants.

Though it is lawful to canvass fairly and candidly the verdict of a jury, and the opinion delivered by the judge.

And a fair report in a newspaper of what passed in court on a cause, is not a libel.

Though it is libellous to publish what passed *ex parte* before a magistrate previous to committing him for trial, as tending to prejudice the minds of the public and of the jury.

So a publication of a copy of the resolution of the secret committee of the House of Commons, though it contained a charge of a libellous nature against a person named in it, was held not to be a ground for an information; and the Court in that case were of opinion, that the publications of the proceedings in parliament, or in court of justice, were not libels.

But it must be a plain narration of such proceedings, for where it was mixed with observations of the publisher exaggerating the account, and conveying an insinuation prejudicial to the plaintiff, an action was held to lie.

6. "Censures passed by sectaries against any of their body, for non-observance of the rules and ordinances of their sect, shall not be deemed libels."

For where the prosecutrix was a *Quaker*, who being less rigid than the rest of the sect, the brethren first admonished her, then sent deputies to her; and lastly, expelled her, and entered as a reason in their books, "for not practising the duties of self-denial:" the Court were of opinion, That this was merely a piece of discipline, and therefore not a libel.

7. It is not a libel for a newspaper to comment fairly and without malice on any place of public amusement, or any public performer, *aliter* if done maliciously and untruly.

Neither can the proprietor of a public place maintain an action on the ground, that a performer being libelled, was thereby prevented from performing.

"Publications in newspapers may be libellous or not, according to the view with which they are published."

As where an advertisement was inserted by the defendant in a newspaper, offering a reward of ten guineas to any one who could give information whether the plaintiff (describing him) was married previous to 9 o'clock in the morning of the 1st of August 1799; it was contended for the plaintiff, that this was libellous, as meaning to impute bigamy to him: it was, on the other hand, relied upon for the defendant, that it was put in by the plaintiff's wife to procure information as to whether the plaintiff had another wife living: in summing up to the jury, Lord *Ellenborough* left them to say, *quo animo*, it was published; if it was to impute bigamy to the plaintiff, it was libellous, but if fairly put in by the wife, for the purpose suggested, that it was not so: there was a verdict for the defendant.

Delany v. Jones,
4 Esp. N. P. Cal.
191.

8. So it is not libellous to ridicule a literary composition, or the author of it, on account of the work, if there is no reflection on his private life, though it may render him ridiculous.

Sir J. Carr v.
Hood,
1 Campb. 355.

Though these cases on *indictments* and *informations* for libels do not properly belong to this Treatise, yet being necessary to the clear understanding of the doctrine under this head, I have thought it not improper to insert those now mentioned, and the other cases on the same head, premising those cases on the rules adopted by the Court in granting informations.

As, 1st, It is a general rule that the Court will not grant an information for a private libel, charging any person with an offence, unless such person *will deny the charge upon his oath*.

Rex v. Miles,
Doug. 271.

For if the party admits the libel to be true, or does not deny it, though being true does not excuse the libel, yet is sufficient to induce the Court to leave the party to his remedy by *indictment*.

Rex v. Bickerton,
1 Stra. 498.

But to this certain exceptions have been admitted: 1. Where the libel is founded on charging the prosecutor with *words delivered in parliament*, for such cannot be questioned (*Bill of Rights 1 W. & M. sect. 2. c. 2. art. 9*): 2dly, Where that charge is only general: 3dly, Where the party libelled is at such a distance that he cannot be had to swear, when the information is moved for by a person on his behalf.

Rex v. Haſwell & Bate,
Doug. 572.

But if a member of parliament publishes his speech in the public newspaper, and it contains charges of a slanderous nature against an individual, the Court will grant an information for the offence.

Rex v. Lord Abingdon,
Esp. Cal. N. P.
226.

2. WHEREIN THE OFFENCE OF LIBELS CONSISTS, AND WHO ARE LIABLE TO PUNISHMENT FOR THEM.

1. "As the offence of a libel consists in being the means of propagating slander, it is essential to a libel *that it be published*."

For in an information for a libel in this case, it was held, That copies of a libel being found in the defendant's chamber, was no publication or offence, *without discoursing of it, or delivering it out*.

Rex v. Fitter and Carr,
2 K. b. 502.

So on an information for a libel in this case, it was resolved, That every one who shall be convicted of a libel ought to be a contriver of it, or a procurer of contriving it, or a malicious publisher of it, knowing it to be a libel; for if one reads a libel, or hears it read, it is no publication; as before he reads it or hears it,

John Lamb's case,
9 Co. 59. b.

he cannot know that it is a libel ; but after hearing or reading it, he repeats any part of it to others, or reads it to them, it is a publication of it ; but if he writes a copy of it, and does not publish it to others, it is no publication of it ; but this might be evidence rather against him, unless he delivered the copy to a magistrate.

“ But *writing* a libel seems to be sufficient, though the person “ was not concerned in the publication.”

Rex v. Paine,
Carth. 405.
5 Mod. 163.
8. C.

For where in this case the jury found that the defendant did *write* the libel, but that it was dictated to him by a person unknown to him and to the jury, and that the stranger dictated the whole of the subject-matter which the defendant wrote, the Court held the defendant to be guilty, the writing being the essential part, a *making* of the libel, and so different from *transcribing* of it, as in the last case, which is not of itself an offence.

Rex v. Almon.
9 Burr. 2687.

2. Proof of the sale of a libel in the shop of a printer, is *prima facie* evidence to convict the owner of the shop of having published the libel, and must stand till contradicted, explained, or exculpated by contrary evidence : and though the copies have been sold by his servant without his knowledge, and he afterwards stops the sale, this can only be offered in mitigation of punishment.

Rex v. Middleton,
1 Str. 77.
Case de Famofis
Libellis,
5 Co. 155.

3. If a man sends a libel to *London* to be published, it is his act in *London* if the publication be there.

4. And as to the *mode of publishing* a libel, it is resolved, that it may be published, 1. *Traditione*, or by handing about copies of it : 2. *Verbis aut cantilenis*, reading or singing it in the presence of others.

Hick's case,
Poph. 139.

Writing a letter addressed only to the party libelled, is a sufficient publication *on which to ground an information or indictment* ; for it tends to excite the party to break the peace, by avenging the insult or reproach.

Want's case,
Moor, 127.
Rex v. Benfield
& alt.
2 Burr. 2666.

But repeating part of a libel in merriment, without malice, has been held not to be a publishing : but singing a song in ridicule, or slanderer the person's character, was in this case deemed a sufficient publication.

As where in the case of *Rex v. Hart* (*ante* 12.) [the sect of *Quakers* had expelled one of their members ; and having entered in their book the reason for such expulsion, “ That it was for not practising the duty of self-denial ;” and she sent her maid for a copy of the entry, which was delivered to her by the defendant, who was clerk of the meeting, and this was the only publication proved ; the Court seemed to be of opinion that it was insufficient.

3d, The third species of Slander is called

LIBEL SINE SCRIPTIS.

5 Co. 125.

As by pictures ; raising the gallows before a man's door, and hanging him in effigy, and such like.

3 Bl. Com. 125.

But as to signs and pictures, it seems necessary to shew, by proper *innuendoes* and averments, the defendant's meaning, that they are particularly applied to the plaintiff, and that some special damage has followed.

2. OF THE RULES OF CONSTRUCTION ADOPTED BY THE COURT IN CASE OF SLANDEROUS WORDS.

The old rule in the construction of words was, that they were always to be taken *in mitiori sensu*; but this is now exploded, and the rule is, that they *shall be taken in that sense in which they would be understood by those who hear or read them.*

Bradley v. Meffon,
Mich. 10 G. 2.
Bull. N. P. 4.

Vide *Woolnorth v. Meadows*, 5 East, 464.

But many former rules of construction agree with this: as,

1. "That *all the sentence is to be taken together*; for though part of the words may be actionable, yet they may be so explained by the rest, as not to bear an action."

As where the words were, "*Brittridge is a perjured old knave*; and that appears from a stake, parting the grounds of *H. Martin* and *Mr. Wright*." After a verdict for the plaintiff, judgment was arrested; for though the first words "perjured old knave" are actionable, yet it must be perjury in a court of justice which is actionable; but here the subsequent words explain the words clearly not to mean judicial perjury, and the whole context, when taken together, is not actionable.

Brittridge's case,
4 Co. 19.

2. "Where words are spoken which bear an imputation of slander, or with an intention to defame, the Court will not strain to find an innocent meaning for them."

As where the defendant said to the plaintiff, "How did your husband die?" Plaintiff answered, "As you may, if it please God." The defendant replied, "No; he died of a wound you gave him." On *not guilty* pleaded, the plaintiff had a verdict, when it was moved in arrest of judgment, that the words might have an innocent meaning, as that the stroke might have been given by accident; but the Court said, That the words bore a scandalous meaning, and that they would not endeavour to find out how they might be spoken with an innocent meaning.

Ward v. Reynolds,
Gilb. Rep. 243.

"So, on the other hand, they will not put a forced construction of guilt on words which may bear an innocent meaning."

As where the words were of an attorney, "He is a common maintainer of suits." They were held not to be actionable, for to maintain suits is his business; and the words shall not be construed to import a charge of *maintenance* when applied to him.

Box v. Burnaby,
Hob. 116.

3. "The words should import a *direct charge* of a slanderous nature, not by inference or conclusion, or the Court will not hold them to be actionable."

As where the words were, "*M. Stanhope* hath but one manor, and that he got by swearing and forswearing." The words were adjudged not to be actionable: 1. Because they were too general: 2. Because they did not charge the plaintiff himself with swearing and forswearing; for he might have got the manor so, and yet not be privy to the swearing or forswearing.

Stanhope v. Blich,
4 Co. 15. a.

"Therefore the *person slandered* must always be *certain*, so that there can be no doubt as to the person meant."

As if one was to say, "One of the servants of *J. S.* (he having many) is a notorious felon or traitor;" no action lies, on account of

4 Co. 17. b.

of the uncertainty of the person : but if the person is once named, as if, after conversing about *J. S.*, one says, "He is a notorious thief;" this is actionable, for the person meant may be sufficiently ascertained by the *innuendo*, which in the former case could not be done.

4. "Where words are used with an intention to slander, though the offence which the defendant intended to lay to the plaintiff's charge is improperly expressed, yet may the words be actionable."

Twaites v. Shaw,
Gill. Rep. 216.

As where the defendant said of the plaintiff, "*Twaites* has hired several persons to make false powers to receive seamen's wages." This was construed to convey a charge of *forgery*, and to be actionable, though the word *powers* is general, and may not properly mean *letters of attorney*; yet being so used in common speech, it shall be construed as intending to defame.

5. "The Court will see if the words are of such a description as import damage to the party."

Heriot v. Stuart,
Eip. N. P. Cal.
437-

As if one newspaper state of another that it was *low and scurrilous*, it is not libellous; *aliter*, to say that it was *low in circulation*, as that prevents persons from advertising in it.

3. OF THE PLEADINGS.

I. THOSE ON THE PART OF THE PLAINTIFF.

1. "Where the words or sentence does not of itself contain a charge of a slanderous nature without words of reference, or explanatory of the meaning or application, it may be supplied by improper *innuendoes* in the declaration, as to matters or persons referred to."

"But as to how far the *innuendoes* are to be allowed, it has been resolved,

1. "The office of the *innuendo* being to supply the absence of something necessary to complete the sentence, and shew the application of the words, it can never be admitted to extend their meaning beyond the import of the words themselves."

Barham's case,
4 Co. 20. a.
Castleman v. Hobbs,
Cro. Eliz. 428.
S. P.

For where the words were, "Master *Barham* did burn my barn," with an *innuendo*, a *barn full of corn* (which is felony if there is corn in it, or it be parcel of the dwelling-house); the Court would not suffer the *innuendo* to imply that there was corn in it, when the word would not of itself bear so extensive a meaning.

Hawkes v. Hawley,
8 East, 427.

It was therefore decided in this case where the action was for saying of the plaintiff, that he was "*forsworn*," and the declaration stated an answer in *Chancery* put in by the plaintiff, and laid the word "*forsworn*" *innuendo* in the said answer, that it was insufficient without laying a *colloquium* respecting such answer.

2. "So where the person is uncertain, an *innuendo* shall not make him certain."

4 Co. 27. b.

As if one says, "I know one near or about *J. S.* who is a notorious thief:" the person really meant cannot be supplied by an *innuendo*, when there has been no conversation about him; for the office of the *innuendo* is to contain and design the person who was named in certain before, and stands in the place of a *prodict.*; and therefore

therefore, without something to refer to, cannot be made certain; for it would be inconvenient that actions might be maintained by imagination of an intent, which does not appear by the words on which the action is founded, but which is uncertain, and subject to deceiverable conjecture.

3. "So neither shall the words, if used generally, be extended by the *innuendo* in the declaration to apply to any particular thing, so as to induce guilt from thence."

As where the words were, "He forged a warrant," *innuendo* a certain warrant, by which the sheriff was commanded to take *Margaret Hogg, &c.*, it was held that the *innuendo* could not specify in such manner that which was generally alleged. Thomas v. Axworth, Hob. 2. Hervé v. Duckins, Hob. 45. S. P.

2. "The next part of the declaration material to the action is the *averment*. This is where the words for which the action or information is brought are only criminal by reference to some other fact, which therefore constitutes the ground of the action, or is necessary to maintain it; in such case this matter must be expressly averred in the declaration or information."

As in the case of *traders*, certain words are actionable applied to them, which are not so when used to others; as to call one a bankrupt, &c. In such case it is necessary to aver a *colloquium* concerning such person as a trader, and that the words were used with that application.

So where the plaintiff brought an action, for the defendant's having said, "That he was indicted for felony at a sessions holden," &c., but did not aver that he had not been indicted; after a verdict for the plaintiff, judgment was arrested for want of this averment; for if he was not indicted, there was no crime. Bland's case, Hob. 309.

In like manner in the case of *libels*, the same averments are necessary; and in this case judgment was arrested, because it was not laid that the libel was *of and concerning the plaintiff*. Lowfield v. Bancroft, 2 Stra. 934.

So where the libel was an advertisement, reciting certain orders made for collecting money on account of the distemper among the horned cattle in *Suffolk*, and it charged that the money so collected had been improperly applied, and the information charged this to be a libel on the justices of *Suffolk*; but in the body of the libel no mention was made of the justices of *Suffolk*, nor did the information, in the introductory part, say that it was a libel *of and concerning them*; and though in the body of the information when any order was mentioned, there was an *innuendo*, that it was an order of the justices of *Suffolk*: but judgment was arrested for want of the averment, the *innuendoes* not explaining sufficiently the matter, there being nothing to refer to. Rex v. Alderton, Mayor's Rep. 280.

But where the information was for a libel "*of and concerning the King's government*;" these words were adjudged to be a sufficient introductory averment to support the information by reference of the subsequent matter to them. Rex v. Horne, Cowp. 672.

"But where the words charge a crime, which words are of themselves actionable, it seems that in such case an averment that the crime was not committed, is not necessary."

As where the words were, "I will call him in question for poisoning my aunt; and I make no doubt to prove it." After

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verdict for the plaintiff, it was moved in arrest of judgment, That it was not averred, that in fact the defendant's aunt was poisoned : but *Curia contra*, for the plaintiff's character is impeached though he never did such a fact.

Hawkins v.
Catts,
Hutt. 49.

3. In action by a *trader* for actionable words, as for calling him *bankrupt*, for example, the declaration should state, "That he was a trader, and used the trade of," &c.; for where in this case the plaintiff only declared that he used the *art and mystery* of a baker, judgment was arrested, as it might be only for the use of his own family.

Emerson v.
1 Sid. 299.

So he should also state in his declaration, "That *he gained his living* by buying and selling;" for in this case, for want of such averment, judgment was arrested : for such traders only are within the bankrupt laws.

So the declaration should state, "That *at the time of the words spoken* he was a trader."

Dotter v. Ford,
Cro. Eliz. 794.

For where in this case the plaintiff only declared, "That he was of good fame, & *per multos annos retroactos* was a merchant," &c., the Court inclined to think the declaration ill, as the words did not sufficiently shew that he was then a merchant, as he might have been so for many years past, but have left off trade.

And these several matters must be proved at the trial.

Coleman & ux.
v. Harcourt,
1 Lev. 140.

4. If an action is brought for calling the plaintiff's wife a bawd, *per quod J.S.* left off coming to the house, the special damage being the gift of the action, which is the husband's only, it ought not to be laid *ad damnum ipsorum* : but where the action is brought for words in themselves actionable, and no special damage laid, there such conclusion is right, for the action survives.

Grove & ux.
v. Hart,
Trin. 25 G. 2.
Bull. N. P. 7.
Ibid.

And *Note*, That saying generally, *per quod* several persons left the house, without naming any in particular, is not special damage.

Regina v.
Drake,
Salk. 660.

5. In setting out the words, or the tenor of words, in the declaration in this action, there is a difference between words spoken and words written. Of words spoken there cannot be a tenor, for there is no original to compare them to, as in the case of words written; therefore in the declaration for *words spoken*, variance in the omission or addition of a word is not material; it is sufficient if so many be proved and found as are actionable. But it is otherwise in the case of words written; for though in describing a libel or other writing, there are two ways of pleading, either by the words, saying *cujus tenor sequitur*, or *in hac verba*, &c., or by the sense; if you declare on the words themselves, any variance or mistake is fatal, for *tenor* means a transcript or true copy : but in declaring on the sense, such an adherence is not required, and a variance is not fatal.

Ibid.

Therefore where the declaration was for a libel *secundum tenorem sequentem*, and in setting out the sentence, *nor* was inserted for *not*; though the sense remained the same, the variance was held to be fatal.

6. "As it is essential to a libel that it be *published*, it is therefore necessary that *that* should appear from the declaration; but the word *published* is not essential, nor is there any technical form of words

" words necessary, if it appears by any means either from the particular case, or in any manner that the libel was published."

As where the count in the declaration was "*for printing, or causing to be printed*, a libel against the defendant in error, in a newspaper," and the error assigned was, the want of the averment of publication; the Court held, That the fact of *printing* a libel, though it might be an innocent act, yet, unless qualified by circumstances, should *prima facie* be understood to be a *publishing*, as it must be delivered to the compositor, workmen, &c.; but printing in a newspaper admits of no doubt on the face of it, and shall be intended to be a publication, unless the defendant shall shew that it was suppressed and never published: the Court therefore gave judgment for the defendant in error.

7. The plaintiff need not in his declaration aver, "That the words or charge was *not true*," for that is supplied by the general allegation in the declaration, that the defendant published them *falsely and maliciously*.

8. Where the libel has been published in different counties, the Court will not change the venue into any one of them, as where "it is published in a newspaper, which circulates into many places;" for the defendant cannot say in his affidavit, "That the cause of action arose in such a county, and not elsewhere."

But where the libel was in a letter, written from a place in the county to which it was moved to change the venue, to another place in the same county, there the Court changed the venue; for *the cause of action arose in that county only*.

So where the libel was a letter written in Yorkshire to a person in Germany, the Court changed the venue to Yorkshire; for the only part of the transaction, out of which the cause of action arose, which happened in England, was in Yorkshire, though the actual publication was in Germany.

9. Where the libel is in a foreign language, the words should be set out as in the original in that language in the declaration: for where they were in the French language, but set out according to their purport and effect in the English language, the judgment was arrested, after a verdict for the plaintiff.

"One who procures another to publish a libel is guilty of the publication of it, and in that county in which it is in fact published, in consequence of his procurement, though he should live at the time at another and distant place."

Therefore in an information against the defendant for a libel sent from Ireland, in a letter to the printer of a public newspaper in England, and published in Middlesex, where the paper was printed; evidence that an anonymous letter had been received by the printer, desiring to know if he would print information on Irish affairs, assent to which was notified in the paper; and afterwards two letters were received by the printer in the defendant's hand-writing, in a letter, with the Irish postmark, which was published in the paper; it was held to be evidence of a publication by the defendant in Middlesex sufficient to go to the jury.

Baldwin v.
Elphinstone, in
Excheq. Chamb.
2 Bl. Rep. 1037.

Carpenter v.
Farrant,
Mish. 10 G. 2.
B. R.
Bull. N. P. 8.

Pinkney v.
Collins,
4 T. Rep. 572.
Clifford v.
Clifford,
1 T. Rep. 647.

Freeman v.
Norris,
3 T. Rep. 308.

Metcalf v.
Markham,
3 T. Rep. 652.

Zenobio v.
Axtell,
6 T. Rep. 162.

Per Lord Ellen-
borough,
7 East, 68.

Rex v. Hon.
Robt. Johnson,
7 East, 65.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1. The *general issue* in this action is *not guilty*, or a denial that the defendant spoke the words in question; or, if spoken, that they were not actionable.

2. Several special *pleas in justification* are good, which admit the fact, but deny the slander or defamatory intention.

Brook v.
Montague,
Cro. Jac. 91.

As the defendant may plead that the words were spoken by him as counsel in a cause, and that they were pertinent to the matter in question; so that he may justify the speaking them through concern, or the reading them as a story out of an history; or he may shew from the dialogue that they were spoken in a sense not defamatory; or he may give these matters in evidence on the general issue, for they prove him not guilty of the words *maliciously*.

"And the defendant may justify by shewing the application of the words used not to be slanderous, though they would otherwise import slander."

4 Co. 13. b.
14. a.

As where they were for calling the plaintiff "murderer," the defendant may shew that it was in a conversation concerning the killing of hares, of which the plaintiff having said that he had killed so many, that the defendant then said that he was a murderer; but *meant of hares*.

"But it is no justification of slanderous words *that the defendant heard them from another person* if he repeated them; for every one is answerable for the slander which he himself propagates of another."

Anon.
G. Hall, 1752.
Bull. N. P. 20.

As where this action was brought by the captain of a ship against a merchant of *Bristol*, for saying that his vessel was seized, and he put into prison at ———, for smuggling corn: Ch. Just. *Lee* held, That proof of the defendant's *having heard it read out of a letter, and that he only reported the story*, was no justification; but that he was answerable for the reports which he propagated; and the jury gave 500*l.* damages.

Lord Northampton's case,
12 Co. 134.
Davis v. Lewis,
7 T. Rep. 27.
Woolnoth v. Meadows,
5 East, 464.

"But the defendant may justify by saying, I heard *A. B.*, say," &c.

With respect to words which the party speaking them may have heard from another, the rule is this: If a person say that such a man (naming him) told him certain slander, and that man did in fact tell him so, it is a good justification; for that person who uttered the slander ought to be sued; but if he utter the slander without adding who told them, it is actionable: and it is not sufficient for the defendant *to disclose in his plea* from whom he heard them, as the plaintiff is then put to the expence of his action, and he must sue the person from whom he heard them. The defendant *at the time of speaking them* should have stated from whom he heard them.

Maitland v.
Goldary,
2 East, 426.

The rule, however, that words may be justified as having been heard from another, is pleadable as a justification only, where the very words spoken by such third are given in the defendant's plea of justification, for it is not sufficient, that words *to such effect* were used,

used, for as the object is to enable the plaintiff to bring his action against the first speaker of them, the very words ought to be given.

So it is no justification of slanderous words that the defendant, *supposing* the plaintiff to have been guilty of the fact concerning which the words were spoken, had so used them concerning him. Powell v. Plunkett, Cro. Car.

3. "The defendant may plead that the words were true; for if so, it is *damnum absque injuria*: and the truth of the words must always be pleaded." 5 Co. 125. Dougl. 373.

For where in an action for words the defendant pleaded not guilty, and offered to prove the words to be true in mitigation of damages, the Chief Justice refused to permit him, saying, that the judges had then come to a resolution never to permit the truth of the words to be given in evidence under the general issue, but that it should always be pleaded; whereby the plaintiff might be prepared to defend himself, as well as prepared to prove the speaking of the words. Underwood v. Parks, 2 Stra. 1300.

"But if the plaintiff, after proving the words laid, goes into evidence of other words, which shew the defendant's ill-will to him, the defendant shall be allowed to give the truth of these words in evidence."

As where the plaintiff brought an action against the defendant for saying, "He was a buggerer, and that he caught him in the fact." After proving the words, the plaintiff gave in evidence, that at another time the defendant had said, "That he was guilty of sodomitical practices." Just. Burnet permitted the defendant to give the truth of these words in evidence; for the action not being brought for the speaking of them, the defendant had no opportunity of pleading that they were true; and being given in evidence in aggravation, the defendant ought to be permitted to shew that they were true in mitigation. Collison v. Loder, at Q. B. for 1, 1750. Regl. N. P.

It is in the case of a libel where the proceeding is by action, that the defendant may plead that the words are true: aliter where the proceeding is by information or indictment. Hob. 253.

"And where the libel contains a charge of fraud or crimes against the plaintiff, which the defendant justifies the truth of, the pleas should state what cases of fraud or crime the defendant means to rely on, for so only can the plaintiff be prepared to meet them with evidence."

As where the libel was for publishing of the defendant in the newspaper, "That he was at the head of a gang of swindlers," and the defendant pleaded the truth of the words generally; it was resolved on demurrer, that the defendant should have stated the particular instances of swindling and fraud on which he meant to rely, and of which he meant to prove the truth. l'Anson v. Stewart, 3 T. Rep. 748.

4. "A recovery of damages in a former action for the same words, is a good plea in bar."

And where a person has once recovered damages in an action for words, he cannot afterwards have another action on account of special damage; as the loss of performance, &c., which may afterwards arise in consequence of the words. Per Cur. Cal. R. B. 544.

Gardiner v.
Helwis,
3 Lev. 248.

Neither shall the plaintiff by any variation, omission, alteration, or explanation, be allowed to vary the words, so as to sustain another action; but the former recovery shall be held a sufficient bar.

5. "Another good plea in this action is *accord and satisfaction*." "But this must be executed, and a *valuable consideration in law*."

Davis v.
Ockham,
Style 245.

For where to an action for words, the defendant pleaded an agreement between him and the plaintiff, *that the plaintiff having done a trespass, that it was agreed that one action should be set against another*. On demurrer, the plea was ruled to be a bad one.

Covill v.
Geoffrey,
2 Rep. 96.

So where to a like action the defendant pleaded an agreement between him and the plaintiff, that he should confess the wrong, and ask the plaintiff's pardon on his knees; it was adjudged to be an insufficient plea, for the consideration was of no value in law.

6. The *statute of limitations* is another plea in bar; as to which it is enacted by stat. 21 Jac. I. c. 16. "That actions for words must be commenced within *two years* after the words had been spoken."

Litt. Rep.
342.

Upon this statute it has been held,

1. That it extends not to actions for *scandalum magnatum*.

Saunders v.
Edwards,
1 Sid. 95.

2. Neither does it extend to cases in which *special damage is the gist of the action*, according to this distinction, viz. where the words are themselves actionable, there the damages shall be held to refer to the words themselves, and not to any special damage; and in such case the statute is a good bar. But where the words are not actionable without special damage, there the statute of limitations is no bar, for the action is for the special damage arising from the words, not for the words themselves.

Law v.
Harwood,
Cro. Car. 141.

3. This action extends not to *slander of title*, for that is not properly slander, but a cause of damage, and the slander intended by the statute is of the *person*.

OF THE EVIDENCE ON THE PART OF THE PLAINTIFF OR PROSECUTOR.

Geare v. Britton,
per Lee, C. J.
Mich. 1746.
Bull. N. P. 7.

1. Though the words are in themselves actionable, the plaintiff is not at liberty to give evidence of any loss or injury he has sustained by the speaking of them, unless it be specially laid in the declaration: but after he has proved the words as laid, he may give evidence of other expressions used by the defendant as a proof of his ill-will towards him.

Snelliger v.
Shelley,
Somerlet Sum.
Ass. 1750.
MSS.
Charlter v.
Barret,
Peake's N. P. C.
22.

As where in an action for words, which were proved, the plaintiff's counsel offered evidence of the *same words spoken on days subsequent to that laid in the declaration*: it was objected for the defendant that this could not be done, because the plaintiff might have brought another action for them, and words actionable in themselves could not be given in evidence in aggravation of damages. Mr. Just. Nares agreed that *different words, actionable in themselves*, could not be given in evidence by way of aggravation, but that the same words might, though spoken at different days,
He

He said this had been the practice, and with good reason; for an action for words spoken but once, would in most cases be deemed frivolous, as they might so be spoken in a heat; and therefore a plaintiff is often under the necessity of proving the slander repeated, in order to shew that it was malicious.

So in such case of words actionable, whatever special damage is laid the plaintiff may go into evidence of it, but not more: as where the words were, "You are a thief, and I'll prove you so," with a *per quod*, that by reason of them one *John Merry*, and divers others, left off dealing with him; the Chief Justice allowed the plaintiff to go into evidence as to *Merry*, but not as to the rest.

Per Lord Ray-
mond,
Browning v.
Newman,
1 *Stia.* 666,

Quere tamen, If the plaintiff, having proved the actionable words as laid, is at liberty to give in evidence other words, unless they are *not of themselves actionable*?

Mead v.
Daubigny.
Peake's N. P. C.
125.

2. But if plaintiff declares for words *not actionable*, and lays special damage; if the plaintiff does not prove the special damage laid in the declaration, he must be nonsuited, because the special damage is the gift of the action. But where the words are themselves actionable, and special damage is also laid; if the words be proved, the jury must find for the plaintiff, though the special damage is not proved.

Guest v. Lloyd,
Bull. N. P. 6.

In the case of *Browning v. Newman* (*supra*) it is said, that where the words were not in themselves actionable, but the special damage is the gift of the action, plaintiff may go into evidence of particular damages not specified in the declaration. But Just. *Bul-ler* makes a *quere* if it is supported by modern practice.

But in general where special damage is laid, the evidence must correspond with it. As where the special damage laid was, loss of marriage with *J. N.*, Lord *Holt* refused to let plaintiff go into evidence of loss of marriage with any body but *J. N.*

Ancn.
2 *Ld. Raym.*
1207.

"So the special damage must be the legal and natural consequence of the slander, for if a person use words of another, which induce a third person to do an illegal act injurious to the person of whom the words are used, that cannot be laid as special damage."

As where defendant said of the plaintiff, who had been his servant, and then employed by *I. O.*, words imputed to him as having acted improperly and dishonestly while in his service, by reason whereof *I. O.*, with whom he then worked, discharged him from his service. It was resolved that the act of *I. O.* in discharging him being tortious and illegal, could not be considered as the legal consequence of the speaking of the words, and so could not be laid a consequential damages; and the plaintiff was nonsuited.

Vicars v.
Wilcock,
8 *East*, 1.

3. "It was formerly holden, that the plaintiff was obliged to prove the words precisely as laid; but that strictness is now laid aside, and it is sufficient to prove the *substance* of them: but the sense, as well as manner of speaking them, must be the same."

2 *Roll. Ab.* 718.
Bull. N. P. 5.

As where the words were laid in the third person, "He deserves to be hanged for a note he forged on *A.*," proof that the

Avarillo v.
Rogers,
G. Hall Stings
T'rin. 1773,

words

before Lord
Mansfield,
Bull. N. P. 5.

words were used in the second person, "*You deserve*," &c., was held not to support the declaration; for there is a difference between words spoken in a passion to a man's face, and spoken deliberately behind his back, the first being more excusable.

Barnes v.
Holloway,
8 T. Rep. 150.

"So words laid to be spoken positively are not proved by proving them spoken interrogatively. As where the words laid were "he cannot pay his labourers;" proof that the words were "have you heard that *Barnes* cannot pay his labourers," were held not to support the declaration.

Rex v. Berry,
4 T. Rep. 217.

So in an indictment the words were laid to be spoken of a justice of peace in the execution of his office: at the trial the justice was the prosecutor, and proved the words spoken, but that they were spoken to him: it was admitted that this was such a variance, that the defendant must be acquitted.

Salk. 694.

4. If a colloquium is necessary to support the action, (as in the case of words applied to the trader,) it must be proved; and for that fault in this case judgment was arrested.

Per Just. Den-
ten, at Stafford,
1729.
Bull. N. P. 5.

So it has been held, that if the words are laid to have been spoken at a particular place, the place not being laid as a venue, but as a description of the offence, that it ought to be proved. *Sed quere?*

Jennings v.
Hankin,
2 Lev. 121.
Craft v. Borito,
Saund. 247.

As in the case of a justification, which if it be local; as where the words were, "That plaintiff stole plate at *Oxford*," it seems that the trial ought regularly to be there; but this would be cured by a verdict.

5. "Where the words are actionable, as referring to the person's profession or business, though it must be proved that the plaintiff was of the business or profession laid in the declaration; yet it seems sufficient to prove him so by reputation."

Berryman v.
Wife,
4 T. Rep. 366

As where the action was by an attorney, charging him with having swindled a person out of a sum of money, by whom he had been employed in a certain suit, and threatening to have him struck off the roll: the plaintiff proved the words, and also his having been employed as attorney in that and several other suits. It was objected for the defendant, that the plaintiff should have proved that he was an attorney, by producing a copy of the roll of attorneys, but the judge was of opinion that the evidence offered was sufficient; and on a motion for a new trial the Court concurred with the judge.

Dr. Moises v.
Dr. Thornton,
8 T. Rep. 308.

In this case however, when the plaintiff declared that he was a doctor of physic, and had duly taken such degree, and the action was for calling him a "Quack;" it was decided, that the mere production of the diploma from a Scotch university, was not sufficient to support the averment. The seal should have been proved to have been the seal of the university, or an examined copy of the corporation book in which the entry was made of such degree, should be given in evidence.

Smith v. Taylor,
2 B. & P. N. R.
156.

A case of *Pickford v. Gutch* is cited in that case, and is to the same effect. The following case however, where the words were spoken by the defendant an apothecary of the plaintiff, and calling him Dr. Smith, and imputing to him ignorance of his profession. The Court of Common Pleas were divided, whether it was necessary

cessary to the support of the action, that the plaintiff should prove himself a regular doctor of physic, or whether his having practised as such, and the defendant having spoken of him as such, and the words reflected on him in that character, was sufficient.

6. In an information for a libel, the witnesses for the prosecution proved, that it was shewn to the defendant, who confessed that he was the author, *errors excepted*: it was objected that this confession, not being absolute, in fact amounted to a denial that that was the very book charged, and so could not be given in evidence; but the Chief Justice admitted it, saying, that he would put the defendant upon proving that there were material variances.

Rex v. Hall,
1 Stra. 417.

7. In an action for a libel, the plaintiff cannot give in evidence other libels published concerning him by the defendant, unless they directly refer to the libel set out in the declaration.

Finnerty v. Tipper,
2 Campb. 72.

8. With respect to libels published in newspapers, and to prevent the mischiefs arising from printing and publishing newspapers for others; it is enacted by stat. 38 Geo. 3. c. 78. § 1. that no person shall print or publish any newspaper, until an affidavit shall be delivered to the commissioners of stamps, containing the names, &c. and places of abode of the intended printers, publishers, and proprietors of the newspaper, and the true description of the house wherein any such paper is intended to be printed, and the title of the paper. By section 9, all such affidavits shall in all proceedings civil and criminal touching any newspaper or any publication, matter, or thing contained in them, be received and admitted as conclusive evidence of the truth of all such matter set forth in the said affidavit, against such persons who have sworn and signed such affidavit, and also against the persons who are therein described as proprietor, printer, or publisher, unless the contrary shall be satisfactorily proved. And by section 10, where the affidavit shall be produced in evidence against the person who signed and made the same, and after a newspaper shall be produced, intituled in the same manner as the newspaper mentioned in the affidavit, in which the names of the printer, publisher, and place of printing shall be the same as mentioned in the affidavit, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any penalty given by the act, to prove that the newspaper to which the trial relates, was purchased at any house, &c. belonging to or occupied by the defendant or defendants, or their servants, or where they usually carried on their business of printing and publishing the said paper, or where it was usually sold. The affidavit mentioned in the act, together with the production of a newspaper tallying in every respect with the description of it in the affidavits, is evidence against the parties mentioned, and as to its publication in the county mentioned in it.

Rex v. Hart & al.
10 East. 94.

In an information, indictment, or action for a libel *published in a newspaper*, proof that the defendant gave bond at the stamp office for the duties on advertisements published in that paper, and had occasionally applied there respecting it, is evidence sufficient to fix him as publisher.

Rex v. Topham,
4 T. Rep. 126.

Where in an action for a libel the plaintiff stated himself to be proprietor and editor of a certain newspaper; on the evidence it appeared,

Heriot v. Stuart.
Espin. Cal. N. P.
437.

appeared, that another person was the editor so called at the office of the paper, though he attended and revised the paper before publication; it was held to be a fatal variance.

4. OF THE VERDICT, JUDGMENT, AND COSTS.

1. AS TO THE VERDICT AND JUDGMENT.

1. "Though all the actionable words laid in any one count of the declaration be not proved, yet if any actionable words are proved as laid, damages shall be given for those."

Compagnon v.
Martyn,
2 Bl. Rep. 790.
& Caf. ibid.

As where the words were, "I have been to Newgate to see a poor young fellow, who is going to be wrongfully transported by a very base woman (*innuendo* the plaintiff's wife); she got a person to arrest him falsely for a debt of 10*l.*, and was not content with that, but she afterwards swore a false debt against him for 100*l.*, and has sworn a robbery against him, and transported him falsely." The defendant pleaded the general issue, and at the trial all the words were proved, except as to the words, "*she swore a false debt.*" The Chief Justice directed the jury not to give damages for the words not proved, but to give them for the rest; and they did so. On a motion to set aside the verdict, the Court held the judge's direction to be right.

This point was so
ruled by Lord
Ch. Eyre in a
case of Esp. N.P.
Caf.

Auger v.
Wilkins,
Barnes 478.
Per Justice
Buller,
Doug. 362.

2. In an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and the jury find a general verdict, if there was any evidence which applied to the bad counts, it being impossible to say how the jury apportioned the damages to the counts, and which they found; there the court will grant a *venire facias de novo*; but where the evidence applied at the trial only to the good counts, there a general verdict may be altered from the Judge's notes.

In Osborne's
case,
10 Co. 130. b.

But if these words are in one count only, the Court will intend that such as were not actionable were only added to shew the malice of the party, and that the damages only were given for such as were actionable.

Onslow v.
Horne,
3 Will. 177.

But if the jury find a general verdict on particular counts, and damages entire, and any of them is bad, the judgment in that case shall be arrested.

2. As to the *Costs* in this action.

It is enacted by stat. 21 Jac. 1. c. 16. "That in actions for words, if the jury give damages under forty shillings, that the plaintiff shall have no more costs than damages."

On this statute it has been decided,

Brown v.
Gibbons,
1 Salk. 206.

1. Where the words are not of themselves actionable, but the consequential damages are the gift of the action, (as here, for calling the plaintiff's wife a whore, *per quod* she lost her customers,) though the damages are under forty shillings, yet the plaintiff shall have his full costs; for it is not the words but the special damage which is the cause of action in this case.

Brown v.
Gibbons,
1 Salk. 206.

But it was further held in this case, that though the Court are bound by stat. 21 Jac. 1., and cannot increase the costs where the damages

damages are under forty shillings; yet the jury are not bound by the statute, and may give 10*l.* costs where they give but ten-pence damages.

2. But where the *words are actionable of themselves*, and special damage is laid, if the damages are under forty shillings, the plaintiff shall have no more costs than damages; for the action is *for words*, though the special damage is also laid.

It has been said, that in a case of *Denny v. Wigg*, *Bull. N. P.* 10. this doctrine had been over-ruled.

But in this case, from *Blackstone's Rep.* which was in the *Common Pleas*, the doctrine was admitted, and held to be the express law on the subject.

3. "So where any other distinct offence is coupled with an action for words, if there is a general verdict, it is not within the statute."

As where the action was for words, *and also* for procuring the plaintiff to be taken and brought before a justice of peace: verdict for the plaintiff, and damages two shillings and sixpence. It was held, that the plaintiff should have his full costs; for it was not an action for words only, and the rest aggravation, but for two distinct offences.

4. In an action for words not actionable, the plaintiff was non-suited. It was moved that the defendant should have no costs, as they should only be given where the plaintiff could have, if he recovered, which here he could not, as the words were not actionable; but the Court over-ruled the distinction, and the defendant had his costs.

5. "The plaintiff must in all cases of slander, recover above 40 shillings, or he shall not have his costs."

Therefore where there was a justification and damages 1*s.* the plaintiff was held not to be entitled to costs, though contended that he was so entitled by reason of the justification.

Burry v. Perry,
2 Ld. Raym.
1588.
2 Stra. 936.
S. C.
3 Bur. 1688.
S. P.

Collier v.
Galliard,
2 Black. Rep.
1062.

Carter v. Fish,
1 Stra. 645.

Drury v. Fitch,
Hutt. 16.

Halford v.
Smith,
4 East. 567.

OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. On an information for a libel, the defendant cannot give in evidence, that a paper similar to that for which he is prosecuted was published by other persons at a former time, which persons have never been prosecuted for it.

Rex v. Holt,
5 L. Rep. 437.

Where a libellous letter refers to a newspaper as containing the slanderous matters imputed to the plaintiff, the defendant may give the newspaper in evidence in mitigation of damages under the general issue.

Mullett v. Hul-
ton. 4 Esp.
N. P. C. 248.

2. As the law formerly stood: On the trial of an indictment or information for a libel the only question for the consideration of the Jury, was the fact of publishing, and the truth of the innuendo's. But whether the subject was or was not a libel was a question of law.

Rex v. Dean,
of St. Asaph,
3 Term. Rep.
428. and *Rex v.*
Withers, *ibid.*

But it is now enacted by stat. 32 Geo. 3. c. 60. "That on every trial of an indictment or information for a libel, the jury may give a general verdict of guilty or not guilty upon the matter in issue, and shall not be required or directed by the court

or

or judge before whom such indictment or information shall be tried, to find the defendant guilty merely on proof of the publication by the defendant, of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

§ 2. Provided always, That on every such trial the court or judge, before whom such indictment or information is tried, shall according to his or their discretion give his or their opinion and direction to the jury on the matter in issue between the King and the defendants, in like manner as in other criminal cases; and the jury may find a special verdict as in other criminal cases. And provided also, that if the jury shall find the defendant guilty, it shall be lawful for him to move in arrest of judgment on such grounds, and in such manner as he might before the passing of the act.

Tatart v. Tipper.
1 Campb. 350.

3. In an action against the defendant for a libel against the plaintiff, accusing him as a bookseller, of printing immoral or foolish publications, the defendant under the plea of not guilty, may give in evidence, that what he has stated is a fair stricture on the plaintiff's publication.

Rex v. Lambart,
2 Campb. 398.

4. On the trial of an information for a libel in a newspaper, the defendant may give in evidence other matter in the same paper, connected with the same subject, to explain the libellous charge, and do it away.

Lord Leicester v. Walter,
2 Campb. 267.

5. In an action for a libel, the defendant under the general issue may prove in mitigation of damages, that the plaintiff was before the publication of the libel suspected of the crimes there imputed to him, and that for that reason his near relations had ceased to associate with him.

CHAPTER XL

The Action of Malicious Prosecution.

THIS is an action whereby damages are recovered for any action against or prosecution of any one, either by suit, indictment, or other legal process, where such action or prosecution appears to arise from any corrupt motive, and to be without any ground or cause for the same.

In treating of this action, I shall first consider, For what Suits or Prosecutions it lies. 2dly, Of Actions on the Case, in the Nature of a Conspiracy. 3dly, Of the Pleadings. 4thly, Of the Evidence. 5thly, Of the Damages.

1st, FOR WHAT SUITS OR PROSECUTIONS THIS ACTION LIES.

1. To bring a *civil action*, though the plaintiff has no grounds, is not actionable, because it is a claim of right, and the plaintiff finds pledges of prosecuting, is amerceable *pro falso clamore*, and is liable to costs. Savill v. Roberts, Salk. 13.

As no action will lie for bringing a vexatious ejection.

But to this as a rule are certain exceptions; as *ex. gr.* It was in this case held, that Purton v. Hon- or, 1 B. & P. 203.

1. "If a person for the purpose of vexation, and of holding a person in custody, sues him for a greater debt than is really due: this action lies, as by such means he may suffer long imprisonment from inability to find bail."

As where the plaintiff declared, that being indebted to the defendant only in the sum of 40l., that he, for the purpose of holding him to excessive bail, and so keeping him in goal, sued out a writ, and had him held to bail for 5000l., in consequence of which he was for several days detained in gaol. The plaintiff recovered for this special injury, and had judgment accordingly. Daw v. Swaine, 1 Sid. 424.

So where the plaintiff declared, "That the defendant not having any cause of action, had caused the plaintiff to be arrested for 300l., whereby he was detained in prison for a long time," &c. The plaintiff recovered for the injury. Skinner v. Gunton, 2 Saund. 228.

But in such case it has been held, That the action will not lie for arresting the plaintiff without cause of action, if he be not held to excessive bail. Neal v. Spencer, Cal. K. B. 257.

2. Where there is a good cause of action; as where a debt is really and *bonâ fide* due, but a stranger, without the privity of the person to whom the money is due, sues out a writ and arrests the debtor for it, he may maintain an action for it, though he was then actually liable to be sued by the real creditor; the party who made Salk. 14. Thurston v. Eunnes, March 47.

made the arrest having no cause of action himself, nor authority from the real creditor.

3. "Where there is a good cause of action, but the plaintiff sues in a court which has not cognizance of the cause, this action will lie: but in such case it seems that it should appear that the plaintiff knew that the court had not cognizance of the cause."

Goslin v.
Wilcock,
2 Will. 302.

As where the action was brought for arresting the plaintiff in this action by process out of the court of *Bridgewater*, when the cause of action did not arise within its jurisdiction, and the plaintiff recovered: on a motion for a new trial, the Court were of opinion, That the mere suing of a person in an inferior court not possessing jurisdiction, was not of itself a sufficient foundation for this action, unless it appeared that that circumstance was known to the plaintiff in that action, and also some degree of malice appeared: as here, the cause of action arising in *Taunton*, where the plaintiff might have been sued, but the defendant arrested him publicly at a fair at *Bridgewater*.

Atwood v.
Monger,
Style 378.

So where the action was for causing a false presentment to be made against the plaintiff before the conservators of the river *Thames*, in a matter which did not appear to be within their jurisdiction, this action was held well to lie.

"So for suing a man in the ecclesiastical court for matters not cognizable there, this action lies."

Waterhouse
v. Hawd.
Cro. Jac. 133.

But in such case the court must want *original jurisdiction* of the cause; for the action will not lie if the action is from its nature suable there, but happens to be barred by the defendant's plea. As if it was for *tithes of wood*, which afterwards appeared to be *timber*, for which no tithe is due: suits for *tithes generally* being suable in the ecclesiastical court, but not *tithes of timber*.

Hob. 260.

4. "Though the action be brought in the proper court, yet may this action be maintained, if the suit or proceeding is utterly without ground, and that known to the person himself, for the undue vexation and damage to the plaintiff."

Waterer v.
Freeman,
Hob. 260, 266.

As where the defendant had sued out a second *feri facias*, and sold the plaintiff's goods, though he had taken before other goods under a former *feri facias*, and in this case it was moved in arrest of judgment, that this having been a civil proceeding, that the action would not lie; but the Court held, that the former *feri facias* being known to the defendant, that this second one was clearly malicious: but if he had not known of the first *feri facias*, that the action would not have lain.

Page v. Wiple,
East, 314. vide
also, Scheibel &
Fairbairn, 1 B. &
P. 288.

For this action will not lie, where the plaintiff having a good cause of action, has sued out a writ, and before execution of it the defendant has paid the money, and is afterwards arrested for it; for the fault there is in not preventing the arrest after satisfaction for the debt, and the action will not lie unless there is malice.

"Malice is therefore in all cases necessary to be proved to support the action."

Goslin v. Cha-
rter, 2 B. & P.
119.

As in an action for maliciously holding to bail, it was held not sufficient merely to prove that the writ was sued out after payment of the debt, if the circumstances afforded no inference of malice; but evidence of actual malice must be given.

So this action was held to lie for suing the plaintiff in the spiritual court, and causing him to be excommunicated *false, fraudulently et malitiosè, without giving him notice*

Hocking v. Matthews,
1 Vent. 86.
1 Lev. 292.

6. "It is not necessary that the first action should have been heard and decided in the defendant's favour; for this action equally lies for any groundless proceedings whatsoever."

For where the plaintiff declared that the defendant, intending to deprive him of his liberty without any probable grounds, sued out a writ of privilege out of C. B., and after an appearance put in by the plaintiff, that defendant, knowing he had no probable cause, suffered himself to be nonsuited, the action was adjudged well to lie.

Martin v. Lincoln,
Mich. 27. Car. 2.
C. B.
Bull. N. P. 13.

7. "But when this action is brought on the ground of a former civil suit having been commenced against the plaintiff, it is to be observed,"

1. That this action must not be brought till the former action has been determined; because till then it cannot appear that the first action was unjust. 2. That there must not only be a thing done amiss, but also a damage either already fallen upon the party or else inevitable.

Farrell v. Nunn,
B. R. Trin.
5 Geo. 3.
Bull. N. P. 13.

"Such are the restrictions under which this action may be brought for civil suits: but it also lies for a malicious preferring of an indictment, information, or presentment against any one."

1. If a man is indicted for any crime that may injure his reputation or fame, he may have this action; for he is falsely scandalized by the malice of his prosecutor, and this is a damage, and for which the law gives an action. 2. If a man is indicted for any offence that subjects him to peril of life or liberty, and for which he may be punished, he may bring this action, for he is endangered in that respect, and receives a damage. If a man be falsely and maliciously indicted, though it neither touches his fame nor liberty, yet may he have this action for the expence and injury to his property in defending himself on the indictment.

Savill v. Roberts
Salk. 13.
2 Ref.

Upon these several cases it is to be observed,

1. That this action will lie though the indictment is bad, so that the party could not have been convicted on it; as where it was for perjury, and the perjury was so ill assigned, that an exception was taken to it by the judge, and the party acquitted without examining any witnesses; yet this action was held well to lie, the indictment serving all the purposes of malice, by putting the party to expence and exposing him.

Chambers v. Robinson,
1 Stra. 169.
Jones v. Gwynne,
Gilb. Rep.
Trin. 11 Ann.

Therefore when the plaintiff had been indicted as constable, for permitting a prisoner to escape, and had been acquitted for want of form, he being headborough and not constable, and having brought an action for malicious prosecution, was nonsuited, the judge being of opinion, That the action could not be maintained, as he had not been acquitted on the merits; the nonsuit was set aside, the Court holding the above doctrine to be the clear law on the subject.

Wicks v. Fentham,
4 T. Rep 248.

2. If the indictment has been not found by the grand jury, yet may this action be maintained; for by the preferring the indictment

Payne v. Porter,
Cro. Jac. 4, O.
Salk 14.

ment the party has been exposed, harassed, and put to expence.

"*Expence alone will be sufficient to maintain this action.*"

Smith v. Hixson,
2 Stra. 977-

For where this action was brought for maliciously prosecuting the plaintiff and his wife for receiving stolen goods; and on *not guilty* pleaded, the jury found for the defendant as to prosecuting the husband, and for the plaintiff as to the prosecution of the wife; and it was moved in arrest of judgment, that the husband should not have judgment on this, as the wife should be joined: but the Court held, That the expence alone which the husband had been at in her defence would support the action, though he himself was in no danger.

Bull. N. P. 14.

3. "But in general, in all cases in which this action is brought, the plaintiff must shew *malice in the defendant, and want of a probable cause; and both must concur.*"

Per Cur.
4 Burr. 1974.
Per Lord
Mansfield, in
Johnstone v.
Sutton,
1 T. Rep. 544.

But from the want of a probable cause, malice may be, and most commonly is implied: but from the most express malice the want of a probable cause cannot be implied. For a man from a malicious motive may take up a prosecution, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this action.

"In trials therefore in this action, if the plaintiff can prove either from the circumstances of the case, as from having a verdict, an acquittal, &c. that the action or prosecution was groundless, and so that there was no probable cause, it shall be sufficient, unless the defendant can shew satisfactorily to the court, that there was a probable cause."

Reynolds v.
Kennedy,
2 Will. 232.

As where the plaintiff brought this action against the defendant for having seized sixty-one hogheads of brandy on board his ship, which brandy was condemned by the sub-commissioners of excise, but which condemnation *was reversed by the commissioners of appeal*. After a verdict for the plaintiff, judgment was arrested; for *the brandy having been condemned by the sub-commissioners of excise*, shewed that there was some probable cause for the seizure, so that one ground of this action failed, *viz.* the want of a probable cause; and the defendant had judgment.

Johnstone v.
Sutton, in error,
1 T. Rep. 493.

So where the action was for putting the defendant under an arrest on board his own ship for disobedience of orders, of which he was afterwards acquitted by sentence of a court martial; and the plaintiff had a verdict: it being for a matter properly cognizable by a court martial, and for which some probable cause appeared, the judgment was arrested.

"And what shall be deemed a probable cause, is matter upon which the court shall decide, not the jury."

As in the two cases last mentioned.

Golding v.
Crowle,
Mich. 25 G. 2.
Bull. N. P. 24.

So where the plaintiff having brought an action against the defendant for a malicious prosecution for perjury, and obtained a verdict: upon a motion for a new trial, the Court set the former verdict aside, it appearing from the notes of the judge, that there was a probable cause; not as being a verdict against evidence, but against law.

And

And *note*, That where a justice of peace, without any regular information before him, grants a warrant to apprehend a person on a supposed charge of felony, and commits him to prison on such charge, this action will not lie: for the immediate act, the arrest and imprisonment, is the offence, and therefore the action should be trespass *vi & armis*. Morgan v. Hughes,
2 T. Rep. 225.

2. OF AN ACTION ON THE CASE IN THE NATURE OF A CONSPIRACY.

An action on the case in the nature of a conspiracy, lies where two or more combine for the purpose of preferring indictments, charging crimes against any one without foundation, or otherwise conspiring to prejudice a man wrongfully, either in person, fame, or property. Finch's Law,
305.

There are four incidents to a conspiracy. 1. It ought to be disclosed by some manner of prosecution, or by making of bonds or promises to one another. 2. It ought to be malicious for unjust revenge. 3. It ought to be false against the innocent. It ought to be out of court voluntarily. The Poulterers' case.
9 Co. 55. b.

2. "But there is a distinction between an action of conspiracy, properly so called, and an indictment for a conspiracy."

1. "An Action of conspiracy, properly so called, lies not unless the party has been indicted *& legitimo modo acquietatus*, for so are the words of the writ; but it seems that an indictment for a conspiracy will lie where there has been a false conspiracy among many, though nothing has been put in execution." 9 Co. 56. b.

"So there is a difference between an action of conspiracy and an action on the case in the nature of a conspiracy."

For if an action of conspiracy is against two or more, *if all but one are acquitted*, judgment shall not go against him: but where the action is case in the nature of a conspiracy, against two or more, then *one only may be found guilty*. Subley v. Mott,
2 Will. 210.

3. "And this being in fact an action for malicious prosecution, with this difference, that an action for a malicious prosecution may be brought against one only; but an action on the case in the nature of a conspiracy, must be against more than one, or against one, charging that he, together with J. S. or others, had conspired to indict the plaintiff, or charge him with a crime, the grounds of the action therefore are the same." Mills v. Mills,
Cro. Car. 239-241.

As where an action on the case, in the nature of a conspiracy, was brought against the defendants for causing the plaintiff to be arrested, and held to bail, where there was no cause of action, the plaintiff recovered. Skinner v. Gunter & al.
Vent. 12.

So though the bill of indictment has not been found by the grand jury, yet this action will lie for the conspiracy, as before, in the case of malicious prosecution. Hord v. Cordery,
Hutt. 49.

MALICIOUS PROSECUTION.

3. OF THE PLEADINGS AND EVIDENCE.

AND FIRST ON THE PART OF THE PLAINTIFF.

1. "As this action is founded on the injury received from a groundless or malicious suit or prosecution, it must therefore appear to the court to have been groundless. The declaration therefore should always state that the suit or prosecution had been decided in favour of the plaintiff, for from the acquittal or discharge, the presumption is in favour of the plaintiff's innocence; and till acquittal, it cannot appear that the first was unjust."
- Farrel v. Nunn*,
Pasch. 1712.
Bull. N.P. 14.
- As where this action was brought for a malicious presentment of the plaintiff for incest, in the ecclesiastical court of *Huntingdon*: on demurrer to the declaration, it was held to be bad, it not being stated that the prosecution was disposed of and at an end, and not still depending; for so a man might be found guilty in the prosecution, and yet recover in this action.
- Fisher v. Bristow*,
Dougl. 205.
- So where the action was for maliciously preferring an indictment against the plaintiff; on demurrer for cause, *That it was not stated how the indictment was disposed of*, the defendant had judgment.
- Lewis v. Farrel*,
1 Stra. 114.
- And it is not sufficient to say, "That the plaintiff was discharged from his imprisonment;" it should state the prosecution to be at an end, for a man may be discharged though not acquitted.
- Morgan v. Hughes*,
Hil. 28 G. 3.
2 T. Rep. 225
- But, it was said in this case, that the defendant must take advantage of the not setting out the decision of the case in the declaration, by plea, for it will be cured by a verdict.
- Skinner v. Gunter*,
Saund. 228.
2. If this action is brought for maliciously holding the defendant to bail, the declaration should state, "That the plaintiff being indebted to the defendant in such a sum, that defendant had sued out a writ for so much more, on purpose to hold him to bail in that action;" it is not sufficient to say, "That defendant caused him to be arrested, and though he offered a common appearance, yet that he held him to bail where no bail by law was required; for otherwise the extent of the injury does not appear."
- Robins v. Robins*,
Salkeld, 15.
3. "Where the declaration sets out the proceedings to have been in a court that had authority of the subject matter, it need not exactly copy the style of the court, as set out in the record; though if a court of a different authority had been described, it would be bad."
- Bains v. Contantine*,
Cro. Jac. 32.
- Therefore where the declaration in this action stated, "That at a general quarter sessions of the peace for *Middlesex*, the defendant had indicted the plaintiff, of which he was afterwards acquitted," &c. On producing the record in court, it appeared that the indictment was found at the general sessions only; the plaintiff at the trial was nonsuited for the variance; but the Court set the nonsuit aside, the sessions appearing to be the same.
- Bushy v. Watson*,
2 Black Rep.
1050.

But

But where the malicious prosecution complained of has been by indictment, the declaration should correspond substantially with the indictment, and therefore where the indictment had been for stealing *unum fenticulum*, and the declaration laid it for stealing *unum finitulum*, the variance was held to be fatal.

Anon.
Case K. B. 555.

4. "For as the declaration in this action sets out all the proceedings in the former suit on which this action is founded, any misrecital is fatal, if in a material part."

For where the declaration stated, 1st, That the indictment was preferred in the *first* year of the reign of *George III.* king of *Great Britain*, &c., and the indictment produced was king over *Great Britain*. 2dly, It stated, That the indictment was *against the peace*, &c.; but in the indictment produced, these words were wanting. 3dly, It stated, That the indictment was preferred and tried at a sessions holden before the *justices in and for the said county*; and in the indictment it was only the *justices in the said county*: these variances were objected for the defendant. Mr. Justice *Asbhurst* over-ruled the first, the averment being the same in substance, which was sufficient; but he allowed the two last; for by the omission of the words "against the peace," the indictment was bad, and therefore those words were material: and as to the third objection, That a man might be a justice *in* a county, though not for it, and therefore that was bad: so the plaintiff was nonsuited.

Franklin v. Webb
Wells Lent Ass.
1773. MSS.

In an action for a malicious prosecution, in which the plaintiff charges the defendant with having imposed on him the crime of felony, by reason of which he was imprisoned, and on production of the information before the justice, there is no charge of felony, though the warrant was to arrest the plaintiff for felony, the evidence does not support the declaration, and the plaintiff shall be nonsuited. And *per Lord Eldon*, If a party makes a complaint before a justice of peace, which the justice conceived to amount to a felony, and issues his warrant accordingly to arrest the party complained against, and the facts do not amount to felony, no action for a malicious prosecution will lie against the party who made the complaint.

Leigh v. Webb,
3 Esp. N. P. C.
165.

So where the declaration, after setting out the record of the indictment preferred against the plaintiff, stated "That *afterwards, to wit, on the 25th day of February, at, &c.*, it came on to be tried," and then stated the acquittal. At the trial by the copy of the record of the indictment produced in evidence, the acquittal appears to be *on Tuesday next after the end of the (Easter) term*." At the trial it was objected, that the variance was fatal. It was answered, That the day laid in the declaration was under a *viz.* and so was immaterial, and that the party might shew the true time. Lord *Kenyon* was of opinion, That he could not admit evidence to contradict the record; and nonsuited the plaintiff. On a motion for a new trial, the Court concurred with the judge, that it was a material allegation though laid under a *viz.* and that the variance was fatal; though they agreed that the declaration might lay the acquittal on the first day of the sittings,

Pope v. Foster,
4 T. Rep. 590.

and prove it on any other day of the *same sittings*, and it would not be fatal, as the whole sittings were to be considered as one day.

Purcell v.
McNamara,
9 East, 156

This case has, however, been since over-ruled and decided, that it is not necessary to prove the exact day of the acquittal laid in the declaration, provided it appears to have been before the action brought, if laid as a description of the time, and not with a *prout patet per recordum*.

Jackson v.
Burleigh,
3 Esp. N.P.C. 34.

To maintain an action for maliciously holding to bail, when less than 10l. was due, such cannot be sustained, unless it is in proof, that the plaintiff knew the fact to be so; it is not sufficient, that in the action less than 10l. was paid into court, which the plaintiff took out, and proceeded no farther in the action.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Bull. N. P. 14.

1. "As to support this action there must both appear to be malice and a want of probable cause, though express malice be proved; yet if defendant can prove a probable cause, he shall have a verdict."

Knight v.
Jermyn,
Cro. Eliz. 134.

Therefore the defendant's plea should shew what causes and grounds of suspicion he had to prosecute the plaintiff: as if it was for indicting the plaintiff for felony, he *should shew his grounds for suspecting him*, as that he was found on the spot, &c.

Johnson et ux.
v. Frowning,
6 Mod. 216.

So he should shew that a felony was committed, and if there was nobody present at the time of the supposed felony but the defendant and his wife, their oath at the trial of the indictment may be given in evidence to prove the felony.

Paia v. Ro-
chester & al.
Cro. Eliz. 871.

2. So in case in the nature of conspiracy, the plea should set out the case as it was, and the circumstances inducing the defendants to prefer their bill or indictment against the plaintiff.

Chambers v.
Taylor,
Cro. Eliz. 900.

And where the defendant so sets out the special matter, he need not traverse the *false & malicious* laid in the declaration, since he states the facts which the plaintiff might have traversed.

Quere tamen of those cases, Whether the general issue would not in such cases be sufficient?

4. OF THE EVIDENCE.

1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

Cooke v.
Dowling,
R. 22 G. 3.
Bull. N. P. 14.
last ed.

1. In an action for maliciously holding the plaintiff to bail, the Court held it, 1st, That it was not necessary to prove that *there was an affidavit of debt to hold the defendant to bail*, for that the indorsement on the writ was sufficient. 2dly, That if the declaration had averred that such an affidavit had been made, *an office-copy of it would have been sufficient*; but if it were stated to have been made by defendant himself, perhaps the original affidavit itself should be produced and proved.

Morrison v.
Kelly,
1 Bl. Rep. 385.

2. If this action is for maliciously indicting the plaintiff for a *felony*, on which the defendant has been acquitted, *there must be copy*

copy of the record and acquittal from the court where the trial was had, and which must be granted by that court, produced in evidence : but where the indictment is only for a misdemeanor, as for keeping a disorderly house, the granting by the Court of such a copy is not necessary. Here the clerk of the sessions attended with the record of the acquittal for the misdemeanor at the sessions, and it was held to be good evidence.

As therefore the court where the acquittal was must grant a copy of the record and acquittal, in order that the plaintiff may maintain his action, and it is discretionary in them to grant or withhold it, it is therefore usual to deny a copy of the indictment where there has been any, the least, probable ground to found such a prosecution on.

But where the plaintiff and another were indicted for forgery at the *Old Bailey*, and acquitted, and a copy of the indictment and acquittal granted to the *other only*; in this action, which was for the malicious prosecution, the plaintiff offered the copy of the indictment so granted in evidence; and the order at the *Old Bailey* was read by way of objection: but the Chief Justice admitted it, saying, That an order was not necessary to make it evidence, nor is it ever produced in order to introduce it: so it was read, and the plaintiff obtained a verdict; which the Court refused to set aside.

2. The plaintiff may give in evidence the substance of that given on the indictment, and the charges of the acquittal, and the circumstances which shew that the prosecution was malicious and without probable cause, and he may likewise give in evidence the circumstances of the defendant in order to increase the damages.

As in this case, in evidence of malice, the plaintiff was allowed to give in evidence, *advertisements put into the papers by the defendant*, mentioning that the indictment had been found against the plaintiff, and other scandalous matters, though an information had been granted for them as libels.

3. The defendant's name on the back of the bill is sufficient, and the best evidence of his having been sworn to the bill; so it may be proved that he was a witness without having the bill.

But a person's name being indorsed is no evidence that he was prosecutor: for in this case it was the name of the justice and others, who were to give evidence.

In an action for a malicious prosecution by indicting the plaintiff at the quarter sessions, the defendant produced the original indictment, which was admitted; but it being objected, That though this was admissible evidence to prove the defendant the prosecutor, by shewing his name on the back of the bill, yet it was no evidence as to the caption, which is a material averment in the declaration, *viz.* that the quarter sessions were held at such a place and time, and before such justices: Justice *Wilmot* was clearly of opinion, That this could not be supported by parol evidence of the minutes of the sessions; but that for this purpose a

Carth. 421.
3 Bl. Com. 226.

Jordan v. Lewis,
1 Stra. 112.

Clayton v.
Nelson,
Palch. 1712.
Middlesex.
Per Parker,
Ch. Just.
Bull. N. P. 13.

Chambers v.
Robinson,
Stra. 691.

Johnson & ux.
v. Browning,
Mod. Caf. 212.

Girlington v.
Pittfield,
1 Vent. 47.

Edward v.
Williams,
Mommouth
Lent Ass. 1764.
MS.

record should have been made up, and the original, or a copy, produced : so the plaintiff was nonsuited.

Rogers v.
Ilcombe,
Taunton Lent
Ass. 1785. MSS.
See Webb.
Hirne,
1 B and P. 281.

In an action for maliciously holding the present plaintiff to bail when nothing was due, and in which the defendant had been nonsuited : to prove the holding to bail, *an office-copy of the affidavit* made by the defendant (then the plaintiff) was offered in evidence. It was objected to, that the *original affidavit itself* ought to be produced : but Justice *Buller* said, This evidence had been held sufficient, in a case from the home circuit, and that he had held the writ as indorsed sufficient evidence : the plaintiff then offered evidence as part of her damages in this action, *the costs she had been put to in defending the former action* ; to which it was objected, that these costs having been taxed upon that action, and paid to the present plaintiff, that she could not go for them again in this action. *E contra* it was insisted, That as the extra costs always exceeded the taxed costs, that they might go for these : and the defendant's counsel further objected, That the gift of the present action being the arrest, that no costs could be proved as damages, but those occasioned by the mere arrest : and the judge rejected the evidence, apparently on both grounds.

Kirk v. French,
Espin. Caf. N. P.
79.

So, to prove the suit at an end, a judge's order to stay proceedings on payment of costs in that cause, and proof of payment, is not sufficient evidence to prove the first suit determined.

Goddard v.
Smith.
Salk. 21.
Mod. Caf. 261.

4. If the plaintiff declares for a malicious indictment of which he was *lawfully acquitted*, if on the trial it appears that he got off *noli prosequi*, the evidence will not maintain the declaration ; for a *noli prosequi* is only a discharge to the indictment, but no acquittal of the crime. But if the party had pleaded *not guilty*, and the attorney-general had confessed it, that would support the declaration.

Rex v Parfons
& al.
2 Bl. Rep. 392.

5. In this case, which was that of the *Cock-Lane* ghost, the Court held that there was no need of proving *the actual fact of the defendants meeting and conspiring together* ; that that might be collected from collateral circumstances. It was on an *information* : *ideo quare* if there is any difference in the case of an action ?

I, OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

Savill v.
Roberts,
Salk. 15.

Though an action will lie for a malicious prosecution, yet it is not to be favoured : therefore if the *indictment has been found by the grand jury*, the defendant shall not be obliged to shew a probable cause ; but it shall lie on the plaintiff to prove express malice. However, if he can, the defendant should give evidence of a probable cause, and for this purpose, proof of the evidence given on the indictment is good. And where the fact lies in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the grand jury, or the plaintiff shall recover without proving express malice.

Cobb v. Car,
Middlesex,
Mich. 1746.
Parrot v.
Fishwick,
London, after
Trin. 1772.
Bull. N. P. 14.
Veridale v.
Manfall,
Mich. 9 G. 2.
MSS.

So in an action for malicious prosecution, Lord *Hardwicke* said, That actual and express malice need not be proved ; but it was

was incumbent on the defendant to shew probable cause for the prosecution ; for without that, the law will imply malice in the first prosecution.

5. OF THE DAMAGES.

1. The foundation of this action being malice, and the want of a probable cause, the Court refused to grant a new trial for excessive damages, though no injury had happened to the plaintiff's trade or reputation, and the sum expended in his defence was much less than the damages given : for the Court held, That the *malice* should enter into the consideration of them. Farmer v. Darling,
4 Burr. 1972.

2. How far the jury may sever in the damages it has been decided; that where this action was brought against the prosecutor of the indictment, and the justice who had committed the plaintiff, and the jury gave 200*l.* damages against the prosecutor, and 20*l.* damages against the justice ; Ch. Just. *King* took the verdict so. But in this case, against several defendants, the jury gave 800*l.* damages against one, and 100*l.* each against three others. Lord *Lowfield v. Raymond* said it could not be done ; and a verdict was given for 1100*l.* against them altogether : *ideo quare* ? Lane v. Santeloe,
1 Stra. 79.

Lowfield v. Bancroft,
2 Stra. 910.

CHAPTER XII.

The Action of Trover.

TROVER is an action which lies where one man gets possession of the goods of another by delivery, finding, or otherwise, and refuses to deliver them to the owner, or sells or converts them to his own use, without the consent of the owner; for which the owner by this action recovers the value of his goods.

In this action the defendant is supposed to have come legally into possession of the goods, and the wrong done, or the gift of the action, is the illegal conversion of them to his own use; without which the action cannot be maintained.

I shall in this action consider, 1st, The nature of it, with reference to the things for which it lies: 2dly, With reference to the person: 3dly, The pleadings: 4thly, The evidence: 5thly, The damages and costs.

11 OF TROVER WITH REFERENCE TO THE THINGS FOR WHICH IT LIES.

I. IN THIS ACTION THE VALIDITY OF SALES MAY BE TRIED.

These are, 1st, Of sales by the parties themselves: 2dly, Of sales by the intervention of a factor or agent: 3dly, Sales by the sheriff: 4thly, Sales of stolen goods: 5thly, Sales void by stat. 13 Eliz.

1st, Of Sales by the Parties themselves.

“ If a sale is *bonâ fide*, and the vendor does not deliver the thing sold, as the property is changed by the sale, the vendee may maintain trover.”

Owenfon v.
Morse, 1
7 T. Rep. 64.

But if the feller of goods takes notes or bills in payment, without agreeing to run the risk of their being paid, and the notes turn out to be worth nothing, that shall not be considered as a payment. And therefore, where the plaintiff had agreed to buy certain articles of plate from the defendant, and wishing to have his arms engraved on them, the defendant sent for an engraver, who usually worked for him, and he was directed by both parties to engrave them, and to bring them back to the defendant, who was to pay for them, and the plaintiff paid for the plate in certain notes which turned out to be bad: and it was adjudged, That the sale was not so complete, but that defendant might stop the goods as *in transitu*.

2. Of

2. Of Sales by the Intervention of a Factor or Agent.

1. "If goods are *not delivered* to a factor or agent, but he is *only impowered to sell* by the principal, this shall not preclude the principal himself from selling them."

For where the defendant, being owner of a great quantity of malt, then being on board a vessel, impowered one *Smith* a broker to sell it; before *Smith* sold it, the defendant himself sold it; but *Smith* had no notice; afterwards *Smith* sold it to the plaintiff, who brought trover for it against the defendant: it was at first doubtful whether *Smith* the broker would not be liable to the plaintiff, as he could not perform his bargain, though it was without his default, so that his sale ought for that reason to be held valid: but afterwards, *Rollé* Chief Just. held, That the owner's sale should prevail against that of his factor, *who had but a bare authority*, and that the broker's sale should have been conditional, if the owner had not sold before; but he said that neither the broker nor his vendees should be liable to any action for detaining the goods, if they had no notice of the sale by the owner.

Aleyn v. Taylor,
Aleyn, 93.

2. "Where goods are bought by an agent, and possession delivered, but the principal countermands his order, and the seller is willing to take them back, this rescinds the contract, and the seller may maintain trover for them."

For where one *Dewhurst* had an house in *London* and another in *America*, but resided in the latter, and kept an agent in his house in *London*, who bought the goods in question for the plaintiff; the goods were delivered to *Dewhurst's* agent on the 3d and 5th of *May*, and by him sent to the packer's for the purpose of being sent to *America*. On the 9th of *April* preceding, *Dewhurst* had written a letter from *America*, saying that he was ruined, and ordering his agent if he had purchased any goods to let the sellers have them again. This letter was received in *London* the 18th of *May*, and shewn the same evening to the plaintiffs, who then agreed to take back their goods. On the 18th and 19th of *May* attachments were laid against these goods at the suit of other creditors, and in the *October* following *Dewhurst* returned to *England*, and was made a bankrupt. It was adjudged, that *Dewhurst* having offered to restore the goods, and the owner consenting to take them, that the contract was completely rescinded, and that therefore they could not be taken under any process issued against *Dewhurst* the buyer, whose property was at an end, by the plaintiff consenting to take them again.

Salte v. Field,
5 T. Rep. 213.

But if the seller having the offer to have his goods returned does not accept it, but does any act, affirming the sale, (as here by proceeding by foreign attachment,) in such case he cannot have his goods again.

Smith v. Field,
5 T. Rep. 402.

3. A factor has only power to *sell* the goods of his principal and thereby bind him: he cannot bind or affect his principal's property, by *pledging* them as a security for his own debt, though there is the formality of a bill of parcels and a receipt.

Paterfon v. Tash,
2 Stra. 1172.

Therefore

Daubigny v.
Duval,
5 T. Rep. 604.

Therefore where the plaintiff had consigned goods from *France* to one *Davallon* as his factor in *England*, to sell for him on commission, and he pledged them with the defendants. It was held, that the plaintiff might recover the value of them in an action of trover against the defendant, having previously tendered to the factor the sum in which he was indebted to him, and that he need make no tender to the defendant the pawnee.

Newson v.
Thornton,
6 East, 17.

It was further held in this case, that where the factor had received the bill of lading of the goods, that he could not deposit or pledge the bill of lading. For as he could not pledge the goods themselves, neither should he that which represented them.

M. Combie v.
Davis,
7 East, 5.

This case underwent a subsequent consideration in this case; and it should seem that the owner of goods which have been pawned by the factor is not bound to make a tender of the sum for which they were pawned. The Court being of opinion, that liens were personal, and that the persons to whom they were so pawned by the factor could not retain them, even to the extent of what might have been the factor's lien, his act being tortious; but Lord *Ellenborough*, in delivering the judgment of the Court, desired it to be understood, that it was not meant to decide that a factor having such lien might not hand over the goods of his principal to another as a security to the extent of his lien, who might so retain them as a servant of the factor, to the extent of the lien.

East India Com-
pany v. Hentley,
Espin. Caf. N. P.
111.

4. "Wherever a purchase is made by the intervention of a broker or *special agent*, if such broker or agent does not act "within his authority, the principal is not bound:" as for example, where he was employed to buy one sort of silk and he bought another, it was ruled, that the principal was not bound by the bargain, he not having acted within the scope of his authority, which was special, to buy silk of a particular quality; but for all acts of a *general agent*, the principal is liable.

2. Of Sales by the Sheriff.

Ayre v. Aden,
Cro. Jac. 73.
Yelv. 44, S. C.

In this case, the sheriff having taken goods in execution, was discharged of his office before a sale or the writ returned; but he afterwards sold the goods without a *venditioni exponas*: upon trover being brought for them, it was resolved, That the *fiore facias* gave him an authority to sell without any other writ, though he was out of office.

3. As to the Sales of Stolen Goods.

By stat. 21 H. 8. c. 11. "Goods stolen shall be restored to the owner, upon his giving or procuring evidence against the felon, so that he be prosecuted to conviction."

2 Inst. 714.
Kel. 47.

Wherever therefore the felon is convicted, the owner may maintain trover for the goods stolen, into whose hands soever they have come; and at common law they were not bound, even by a sale in market overt.

But if stolen goods are sold in market overt, *the owner cannot maintain trover for them till after the conviction*; for it depends on that whether he will be entitled or not, as till then he has no property, which is necessary to maintain this action; and if the person who had so bought them in market overt, sells them in the interval before conviction of the felon, he shall not be liable to an action of trover; for he shall not be obliged to keep the goods which may be of a perishable nature: and that shall be so, though *he received notice* from the owner of the goods of their being stolen: but *per Lord Kenyon* the plaintiff having a right to restitution of his goods, would perhaps be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them up; for then the goods are converted to the prejudice of the owner.

Horwood v. Smith,
2 T. Rep. 750.

"But the owner is only entitled to have his goods where the prosecution was for felony."

For where the defendant had been *defrauded* of the goods in question by false pretences, by a person who had pawned them to the plaintiff for a valuable consideration without notice of the fraud: this person the defendant had prosecuted for the fraud, and convicted him, and then got his goods again: the pawnbroker brought trover for them: it was insisted for the defendant, that the possession obtained by the plaintiff was similar to the possession of stolen goods, except that the one was through the medium of felony, and the other of fraud: but it was resolved, that the owner was entitled to restitution of his goods in case of felony, by virtue of a positive statute, but that that did not extend to a case of fraud, and that therefore the pawnbroker might well maintain the action.

Parker v. Patrick,
5 T. Rep. 175.

4. As to Sales void by Statute 13 Eliz. c. 5.

By this statute it is enacted, "That all feoffments, gifts, alienations, and conveyances of lands or goods, and all and every bond, suit, judgment, and execution made to the intent to defraud creditors, shall be null and void."

1. But it seems settled, That no conveyance shall be deemed fraudulent within the statute, unless it can be proved that the person was indebted at the time of the assignment or conveyance, or very nearly so, so that they may be connected together.

Waller v. Burrows,
In case 1745; &
Taylor v. Jones,
Ibid. 1743.
Buller N. P. 257.

2. "The only cases to which the statute extends is where there is no consideration, or where there is no possession, or only a colourable possession delivered, and therefore does not extend to cases of real and *bond fide* creditors."

As where one *Charter* being indebted to the plaintiff and also to one *Shepherd*, was sued by *Shepherd*, who recovered against him in *Easter* term 1791, on which he brought a writ of error, which was non-prossed in *Easter* term 1793: *Shepherd* was then going to take out execution, when *Charter*, knowing *Shepherd's* intention, went to the plaintiff and informed him of his situation, and

Holbird v. Anderson,
5 T. Rep. 236.

and gave him a warrant of attorney to confess a judgment, which was immediately entered up, and an execution sued out and delivered to the defendants (the sheriffs) two hours before that of *Shepherd*. The defendant levied under *Shepherd's writ*, and returned *nulla bona* to the plaintiff, who thereupon brought his action; for the defendant it was contended that this was fraudulent within the stat. 13 *El.*; but the Court held, that the defendant might so prefer a *bond fide* creditor, and that the case was not within the statute.

Eftwick v.
Cailland,
5 T. Rep. 420.

The assignment of all his effects to a *bond fide* creditor is only void in the case of bankrupts, for a common person may make such an assignment, which shall be good.

Per Buller Just.
2 T. Rep. 595.

3. "Wherever therefore a person makes a bill of sale of his effects, or any other similar conveyance, *unless possession follows and accompanies the deed*, it shall be deemed fraudulent, and the goods may be recovered in trover."

Twyne's case,
3 Co. 80 b.
Vid. *Paget v.*
Perchard & alt.
Espin. Caf. N P.
205.

As where one *Pierce* being indebted to *Twyne* in 400l. and to *C.* in 200l. and *C.* having brought an action of debt against *Pierce*, pending the writ, he made a general deed of gift of all his goods and chattels to *Twyne* in satisfaction of his debt; but notwithstanding, *Pierce* still continued in possession of his goods, some of them he sold; he shorn the sheep, and marked them with his own mark, and exerted every act of ownership: this transaction appearing, it was clearly held, That the conveyance to *Twyne* was fraudulent and void within the statute 13 *Eliz.*; for it was made with a trust between the parties, and the owner continuing in possession, it gave him a credit whereby he traded with others, and so was enabled to cheat and defraud them.

Stone v.
Grubham,
2 Bullf. 218.

Barnford v.
Baron, quot.
2 T. Rep. 594.

So where in trover by the sheriff for goods which had been taken by the defendants, after they had been taken in execution by him at the suit of a creditor, in April 1787; the defendants set up an assignment of the goods by *Hayes* (who was the owner) to two persons for the benefit of such of his creditors as would sign a composition-deed by a certain time, which assignment was dated 16th August 1786: the plaintiff replied, that in that assignment it had been agreed that *Hayes* should continue in possession till May 1787, and that he did so continue in possession; upon which the Court were clearly of opinion that the assignment was fraudulent, and void within the statute 13 *Eliz.*, though it appeared that during that time *Hayes* was to account with the two trustees for the profits of his business; and the plaintiff recovered accordingly.

Edwards v.
Harben,
2 T. Rep. 587.

So where a person, being indebted both to the plaintiff and the defendant, made a bill of sale of all his effects to the defendant, in which was a clause that the defendant should be at liberty, within fourteen days from the execution of the bill of sale, to enter upon and sell the effects so assigned, in case the money was not sooner paid; before the end of the fourteen days, the person died; upon which the defendant entered upon the goods and sold them, when it was held that the owner having been left and dying in possession of the goods, that the assignment was fraudulent, and that the defendant, having so interfered, should

should be liable to the whole of the plaintiff's debt as executor *de son tort*.

"But if a party takes a bill of sale of goods from the sheriff, and not from the owner himself, the mere suffering the original owner to remain in possession, is not of itself sufficient to make the sale void."

As when the goods of one *Aburn* being taken in execution, the plaintiff, a relation of his, purchased them of the sheriff, and took a bill of sale, but permitted *Aburn* to continue in possession; *Aburn* afterwards executed a bill of sale to the defendant (a creditor) of the same goods, under which the defendant took possession. The plaintiff gave notice of the prior bill of sale to him, and required the defendant not to sell the goods, but notwithstanding which he did sell them; and on plaintiff bringing an action for the value, it was held that he was entitled to recover.

Kidd v.
Rawlinson,
2 Bos & Pull. 59.

"It must not therefore be taken that the circumstance of the former owner's remaining in possession is sufficient to make the sale void in every case fraudulent, as in the last case, it was adjudged not to be so." The rule is still further to be narrowed, that is, that it shall be void only against creditors, strangers to the transaction, but it is good as between the parties themselves, and even against a creditor, who heard of the circumstances, and assented to the possession so continuing, and was so resolved in this case.

Steall v. Brown
and Parry,
1 Taunt. 381.

4. "The cases here are where the conveyance is *absolute*; for cases may occur in which the owner may continue in possession, and yet the conveyance not be fraudulent: as if the conveyance is *conditional*, there the vendor's continuing in possession does not invalidate the sale, *because by the terms of the conveyance* the vendee is not to have possession till he has performed the condition."

Per Buller, Juff.
in 8. C.

"So where the want of immediate possession is consistent with the deed."

As where on the marriage of Lord *Montfort*, the household goods of his house in town were, *inter alia*, conveyed to trustees, in strict settlement: Lady *Montfort*'s fortune was 10,000*l.* equal to pay all his debts at the time of his marriage, and the goods were added to the settlement, Lord *Montfort*'s real estate not being deemed sufficient to make an adequate settlement; the defendant was a creditor before Lord *Montfort*'s marriage, and had taken the goods under an execution: on trover brought for the goods by the trustees, it was held clearly, That the statute 13 *Eliz.* was only intended to operate against *fraudulent* conveyances, and that possession alone was not evidence of fraud; that this therefore being a fair and proper settlement, could not be deemed void under the statute, particularly as Lady *Montfort*'s fortune was equal to pay all the debts; and the household goods were included in the settlement for a sufficient reason.

Cadogan v.
Kennett,
Cowp. 432.
Vid. et Foley v.
Burnell, quot.
Cowp. 435.
S. P.

So where personal property, and, among other things, some cows were settled on the marriage of the plaintiff's wife, on certain

Hastington v.
Gill,
2 T. Rep. 597.

certain trusts, they were held not to be liable to the husband's debts.

Vid. Jarmin v. Wollootton. *Post*, in this chapter.

In delivering his opinion in the last case, Lord Mansfield said, That courts of law had gone every length to protect personal property in the wife, in cases clear of fraud; that this was done by the intervention of trustees in whose hands all fair settlement of the wife's property before marriage was protected; but where the conveyance is after marriage, that is void against creditors, as being without consideration.

Prec. in Cham. 101. 426.

But where a settlement is made after marriage, *the portion being paid at the same time*, such is good against creditors; so it has been holden, That where the settlement was made after marriage, recited to be in consideration of a portion secured, where in fact such portion has been secured, that that was good against creditors.

5. "Another case of sales not void under the statute, though "no possession has been delivered, is that of the sale or assignment of *ships at sea*." *Vid. ante* Chapter of Assumpsit.

Atkinson v. Malling, Pasch. 28 G. 3. 2 T. Rep. 462.

For if a ship be sold while at sea, *a delivery of the grand bill of sale* amounts to a delivery of the ship itself, for it is the only delivery of which the subject-matter is capable; and besides, it does not give any degree of false credit to the vendee or assignee.

Rolleston v. Hibbert, 3 T. Rep. 406.

But an absolute bill of sale of a ship at sea, is void under statute 26 Geo. 3. c. 60. *unless there has been a registry of the ship, and the certificate of the registry be recited in the bill of sale*, even though the vendee had given an undertaking to restore the ship on a certain day, on payment of the sum advanced on her credit.

With respect to the assignment of ships at sea, a further regulation is made by statute 34 Geo. 3. c. 68. § 16., which enacts that when a ship is absent from port, so that an indorsement or certificate cannot immediately be made, a copy of the bill of sale shall be delivered to the person authorized to make the registry, and within ten days after, the ship shall return into port to which she belongs, an indorsement shall be made, and a copy delivered in manner therein mentioned, or such bill of sale or contract shall be null and void.

Since the passing of this act, no property vests by way of transfer of the ship, until all the above requisites are complied with.

Moss v. Char-noch, 2 East, 399.

And therefore, where a trader before he becomes a bankrupt executed a bill of sale to a creditor, but before the other requisites required by the statute 26 & 34 of Geo. 3. were performed, he became a bankrupt. It was held, that no property possessed in the ship, but that it was recoverable by the assignees, though ten days after the ship's return all the requisites of the statutes were complied with, the Court holding, That no bill of sale or other instrument should have effect until all the requisites imposed on the parties to the sale were complied with, and that no relation back should be allowed good, so as to make the conveyance effectual from a precedent time.

6. "No

6. "No person can take advantage of the statute 13 of Eliz. but the creditors themselves."

Therefore where *A.* having made a fraudulent conveyance of his goods to *B.*, and then died, *B.* brought an action against *A.*'s administrator for the goods; it was held, That the administrator could neither plead the statute nor maintain the possession of the goods even to satisfy the creditors; but the Court held, That they might charge the vendee as executor *de son tort*.

Hawes v.
Leader,
Cro. Jac. 270.

2. INSTRUMENTS CONVEYING A CHOSE IN ACTION, MAY BE RECOVERED BY TROVER.

As where this action was brought for *letters patent of wine licence*; after a verdict of the plaintiff, it was moved in arrest of judgment, that a record cannot be converted: *sed non allocatur*; for the words *letters patent* here signify the exemplification of them under the broad seal, and so is intended in *common parlance*; for which this action lies.

This was held in many modern cases.

So trover was in this case held to lie for a bill of exchange.

So for *million lottery tickets*.

So for *a bond*.

So for *the title-deeds of an estate*.

Jones v.
Wickworth,
Hard. 111.

Cowen v.
Abrahams,
Esp. Cal. N.P.
50.
Lucas v. Hayes,
Salk. 130.
Ford v. Hopkins,
Salk. 283.
Arnold v.
Jefferson,
Salk. 654. Yes,
Barr. v. Field,
2 T. Rep. 708.

3. TROVER WILL NOT LIE FOR GOODS WHICH HAVE BEEN CONDEMNED BY A COURT HAVING COMPETENT JURISDICTION.

As where the plaintiff brought an action of trover for a ship, tackle, and furniture, which ship had been condemned by the admiralty of France as prize, and bought by the plaintiff when sold under the sentence, but had been taken out of his possession by the defendants claiming property on the ground of the capture being illegal: It was resolved, That the courts here were bound to give credit to the sentence of foreign courts, and that their condemnations were not examinable at common law; and therefore the plaintiff had judgment.

"But where the jurisdiction of the court is in any respect limited, there trover will lie for goods which have been seized or condemned by such courts, for the purpose of trying if such courts have exceeded their jurisdiction."

As in the case of condemnations by the commissioners of excise, who, though under the statutes of excise they are invested with the right of condemning exciseable goods, &c. yet may the owner nevertheless maintain an action of trover for them, if he supposes them illegally condemned.

4. Another case in which trover lies, is to try the property arising under

Hughes v.
Cornelius,
Sir T. Raym.
473.

Papillon v.
Buckner,
Hard. 478.
Terry v.
Huntingdon,
Hard. 480. S. P.

CONSIGNMENTS OF MERCHANDIZE.

"These consignments are made through the medium of the bill of lading. The form of which is either general to the
"order

" order of the shipper, or to a consignee by name. Bills of lading are by the custom of merchants transferrable and negotiable (*Lickbarrow v. Mason*, 5 T. Rep. 583.) and by the indorsement and delivery of the bill of lading, the property in the cargo is transferred to the indorsee, (1 Term. Rep. 215.) The consignor has however a right to stop the goods *in transitu*, under particular circumstances, varying with the persons to whom the goods are consigned, such as where the indorsement has not been *bonâ fide*, or the property has not actually come to the possession of the consignee, who though he may have accepted bills for the amount of the cargo, will not be able to pay them when due.

9 East, 516.

" If, therefore, a person takes a bill of lading, knowing that the goods had not been paid for; that the consignee was insolvent, or with a view to defeat the consignor's right to stop *in transitu*, or with knowledge of any circumstance which should make the bill of lading not fairly and honestly negotiable, no property is transferred thereby."

Cuming v. Brown,
9 East 506.

But it is not necessary that the indorsee should know that the goods were actually paid for, it is sufficient if he considers the consignee as fairly possessed of them; therefore, where the indorsee knew that the consignee had regularly accepted bills for them, and had no knowledge that he was insolvent; it was adjudged, that the property was fairly transferred, and that the consignor could not stop *in transitu*.

Consignments here to be considered are, 1st, To a creditor: 2d, To a factor: 3d, To any other person.

And 1st, Of Consignments to a Creditor.

Hibbert v. Carter,
1 T. Rep. 745.

1. The indorsement of the bill of lading to a creditor conveys an absolute property to the indorsee; and he may maintain trover for the goods included in such bills of lading.

Caldwell v. Ball,
1 T. Rep. 205.

And where there are several bills of lading, of different imports, which are differently indorsed, the person who first gets one of them by legal title from the owner or shipper, has a right to the consignment in exclusion of the others.

2. Of Consignments to a Factor.

Per Lord Mansfield, in *Wright v. Campbell*,
4 Burr. 2046.

If there is an authority ever so general by indorsement of the bill of lading, without disclosing that the indorsee is factor, the owner (as between him and the factor) retains a lien till the delivery of the goods, and until they are actually sold, and turned into money.

Ibid.

But if the goods are *bonâ fide* sold by the factor while at sea, such sale shall be good, and shall bind the owner, because the goods were *bonâ fide* sold, and by the owner's own authority.

S. C.

And if a factor to whom a bill of lading is indorsed generally, but in fact in him *as factor*, though that is not expressed, indorses it over as his own property; such indorsement shall be good, if

for a fair and valuable consideration and without notice; *aliter* if only a spurious one to defraud the owner.

3. Of Consignments to other Persons.

The act of consignment, vests the property in the consignee but *sub modo*, for after goods have been consigned, the consignor, if he thinks fit, may stop the goods before they come to the hands of the consignee, if the consignee becomes insolvent or a bankrupt before they are received. (*Snee v. Prescott*, 1 Atk. 245.)

Ickbarrow v. Mason,
Mich. 28 G. 3.
2 T. Rep. 62.

"This forms a very material head of the law, and many cases have been decided on it. And 1st. This power of stopping the goods is only while they are *in transitu*; for if they come into the possession of the consignee, then the property is changed, and the consignor cannot stop them."

As where in trover for a quantity of files, the case was, That *Moore* the bankrupt had ordered the goods in question, on the 3^d of *October*, from the plaintiffs, who were manufacturers at *Sheffield*; on the 14th of *November* they were sent by the waggon, and arrived in *London* on the twenty-second; the plaintiffs drew a bill on *Moore* for the amount, but it was never paid: on the 15th of *November* a docquet was struck, and on the 18th the commission issued, and the defendants chosen assignees: on the 24th a provisional assignment was made to the messenger under the commission, who on the same day demanded the goods of the defendants, and put his mark upon the cask, but did not take them away: on the 28th of *November* the plaintiffs wrote to the agent of the waggon to stop the goods, in case they had not been delivered; and brought their action against the carrier and the assignees of the bankrupt, who had got possession of them: the Court were of opinion, That sufficient possession had been taken by the assignees under the commission, which it therefore was not in the power of the consignor to divest or countermand; and therefore gave judgment for the defendants.

Ellis v. Hunt, & alt.
3 T. Rep. 464.

"And that delivery is not confined to a delivery at the consignee's place of abode, for if delivered at a third place to the order of the consignee, or he has exercised any act of ownership, it is sufficient to prevent the consignor's right to stop *in transitu*."

Wright v. Lawes,
2 Eip. N.P. Cal.
82.

As a delivery on board a ship chartered to the consignee, is a delivery to the consignee, and after such delivery the consignor cannot stop them *in transitu*; but where the ship was chartered by the consignee to *Russia*, and by the laws of that country, where the consignor has shipped goods to order, if he suspects the solvency of the consignee, he may have the goods taken out again, by process out of the Courts there, but the consignor, in place of that, took other bills of lading from the captain, which he sent over to *England* to his own correspondent here: it was adjudged that that was a stoppage *in transitu* by the consignor, sufficient to prevent the property from attaching in the consignee here.

Ingles v. Usherwood,
1 East, 315.

So where goods then in the vendor's warehouse were sold, but not actually delivered: but the vendor charged warehouse room for them from the time of sale; this was held to give the property to the vendee, and prevent the vendor's right to stop them.

Hurry v. Man- gles, 1 Campb.
452.

Harman v.
Anderson,
2 Campb. 243.

So where goods were at a wharfinger's, and the purchaser lodged there an order for the delivering to him, and they were transferred into his name in the wharfinger's books, this was held to be such a delivery, as prevented the consignor from stopping in *transitu*.

Ibid.

So, if the sale note was delivered to the wharfinger, though there was no transfer in the book, it would defeat the vendor's right to stop them.

2. "Goods consigned to a third person to be shipped abroad to the orders of the consignee, after the arrival at such third person's, cannot be stopped *in transitu* by the consignor."

Dixon, Aff. of
Bathiers, v.
Baldwin,
5 East. 175.

Here the bankrupts lived at *Manchester*, and were in the habit of sending goods to *Hamburg* from *Hull*, which the defendant sent to their order to one *Metcalf* at *Hull* for the purpose of being shipped: it was adjudged that as soon as they came to *Metcalf's*, the delivery was complete, and the consignor could not stop them.

Molst v. Pownall
& alt.
Esplin. Caf. N.P.
240.

In this case, which was an action of trover for a cargo of fruit, it appeared that the plaintiff, who was a merchant residing as *Leghorn*, had, on the 26th of *September* 1792, received an order from *Dutton* and Co. of *Liverpool* to charter a ship with a cargo of fruit on their account, which he accordingly did. In the month of *March* 1793, which was before the arrival of the ship at *Liverpool*, *Dutton* and Co. were declared bankrupts. The plaintiff having heard of the circumstance of their stopping payment, sent one of the bills of lading to his agents, *Staples* and Co. of *London*, who authorized a Mr. *Ellames* of *Liverpool*, as agent to the plaintiff, to stop the cargo before it was delivered to *Dutton* and Co. On the 9th of *June* following, the ship entered the port of *Liverpool*, but was the same evening ordered back to a place called *Hoylake* to perform quarantine. On the day the ship first entered *Liverpool* (9th of *June*) *Spencer*, one of the defendants, went on board and claimed the ship as assignee of *Dutton* and Co.'s estate, opened some chests of fruit, and put two persons on board, who staid there till the 18th *June*, when the quarantine ended. On the 17th of *June*, while the ship was performing quarantine, *Ellames*, as agent for the plaintiff, served a notice of *Dutton* and Co.'s bankruptcy on the captain, and claimed the goods on behalf of plaintiff, at the same time offering him an indemnity. Similar notice was served on the defendants. On the 18th *June* the vessel came into harbour, and on the 19th broke bulk, when *Ellames* again made a claim; but the captain delivered the cargo to defendants; to recover which was the object of the present action. Lord *Kenyon* was of opinion, (which was afterwards concurred in by the court of *K. B.*) that there was a sufficient stopping *in transitu*; that in the present action the voyage was not completed till she had performed quarantine, till which time she was *in transitu*, and as the plaintiff's agent had given notice and claimed the goods before the completion of the voyage, he was of opinion that the plaintiff had stopped the goods time enough to prevent the property vesting in the assignees.

Sa'mons v.
Nissen.

But if the consignee to whom the bill of lading is indorsed, does not part with his whole interest in the goods, but only assigns

assigns it to another as a collateral security to him, and so remains interested, or as a partner in the goods, notwithstanding the assignment; there the property of the consignor is not divested, but he may stop the goods before they reach the hands of the consignee, or of the person to whom he indorsed the bill of lading.

Where a merchant sends an order to another to buy goods for him, and the correspondent does so, charging a commission on the goods so purchased, and the vendor is unknown to the merchant, who accepts bills drawn by his correspondent, but before the bills become due, becomes a bankrupt, the correspondent, though not the actual seller of the goods, is as between him and the merchant so far considered as vendor, that he may stop the goods *in transitu*.

Teife, Aff. of
Brown, v.
Wray, 3 East, 92.

So where a merchant entered into an agreement with a captain and chartered his ship to *Russia*, to receive a cargo from his factor there, and sent her there to receive the cargo on his account, and the goods were there put on board at the risk of the merchant, and the factor sent the invoices and bills of lading of the cargo to him; this was held not to deprive the consignor of his right of stopping *in transitu*, the merchant in *England* having in the meantime become insolvent.

Bohtlinck v.
Inglin.
3 East, 381;

2. "Where goods have been consigned to a manufacturer, who as such might claim a lien; if he once parts with the possession, he cannot afterwards stop them *in transitu*. Vid. *Sweet v. Pym*, *post*.

3. "But the right of the consignor to stop *in transitu*, is confined to the case of the insolvency of the consignee."

For where the house of *Scheuman* and Co. at *Memel* consigned goods to the plaintiff, sent him the invoice, which stated it to be on the account and risk of the plaintiff; advised him of having drawn on him at three months, and inclosed him the bill of lading, expressing the delivery in the usual terms "to be, on payment of freight for the said goods;" this was held to give the consignee (the plaintiff) such a property that he could maintain trover for them, he having offered to accept the bills, and there being no suggestion of the plaintiff's insolvency or any stopping *in transitu* on that account. Vid. *Come v. Harden*, 4 East, 211.

Walley v
M^r Gomerey,
3 East, 585.

"And the consignor's right to stop *in transitu* is not taken away by the consignee having paid for part of the goods."

But where goods have been ordered by an agent, who has a power of disposing of them as he thinks fit for his principal's benefit, if they come to his possession, though not to his principals, they cannot be stopped *in transitu*.

Hodgson v. Log,
7 T. Rep. 440.
Leeds v. Wright,
4 Esp. N. P. C.
243

5. Another case in which this action is usual, is to try the validity of

COMMISSIONS OF BANKRUPT, OR TO RECOVER GOODS BELONGING TO THE BANKRUPT ESTATE.

In all actions in which the bankruptcy comes in question, it was necessary to go through all the steps before entered into by the commissioners; that is, to prove, 1st, That the party was a trader: 2dly, The act of bankruptcy: 3dly, The petitioning creditor's debt: 4th, The issuing of the commission: 5th, The assignment;

assignment: 6th, A property in the bankrupt. But as, by the statute 49 Geo. 3. c. 121. § 10. the proceedings before the commissioners are made evidence of the petitioning creditor's debt, the trading, and act of bankruptcy, unless notice is given by the defendant that he means to contest any of them at the trial; as they all may therefore still be contested, I shall therefore consider each of these in their order.

1. The Party must be a Trader.

Who are to be deemed *traders* within the bankrupt laws, depends either on express statutes, or on the decision of the courts on the meaning of that term (trader) as consistent with the spirit of the statutes.

1. The general description of persons subject to the bankrupt laws, is under statute 13 Eliz. c. 7. viz. "Persons using the trade of merchandize, by buying or selling by way of bargaining, exchange, re-change, barter, or chevance by gross or retail, or who seek their living by buying or selling."

2. By statute 21 Jac. 1. c. 19. "Persons using the trade of a *scrivener*, receiving other men's money into their trust or custody, may be bankrupts."

3. By statute 5 G. 2. c. 30. "Bankers, brokers, and factors, are declared to be liable to the bankrupt laws."

4. "Persons having stock in several public companies, are by several statutes declared not to be objects of the bankrupt laws: as having *East India* stock (by statute 14 Car. 2. c. 24.); *Bank* stock; shares in the *English* linen company; royal fishing company; *Guinea* company; *London Assurance* company; *South-Sea* company; *Plate-glass* company; or being concerned in the circulation of *Exchequer* bills; by the several statutes of "7 & 8 W. 3. c. 31. 8 & 9 W. 3. c. 2. f. 47. 5 Ann. c. 13. 7 Ann. c. 7. 3 G. 1. c. 8. and 4 G. 3. c. 37. f. 14."

Colt v. Netter-
vill,
2 P. Wms. 308.

Neither shall buying or selling stock, or other government securities; for they are not goods, wares, and merchandize.

5. By statute 5 G. 2. c. 30. f. 40. "No farmer, grazier, drover, or receiver-general of the land-tax, shall be liable to be made a bankrupt."

Under these statutes it has been held,

Per Lord Mans-
field,
Cowp. 750.
Com. Dig. 522.
2 Black. Comm.
476.

Ibid.

Crump v. Barne,
Cro. Car. 31.

Valentine v.
Vaughan,
Peake N. Caf.
76.

1. The general words of the statute 13 Eliz. being, "*who seek their living by buying or selling*," a man who lives by buying only, or by selling only cannot be a bankrupt: and so for the same reason it being for the purpose of *seeking a living*, one single act of buying and selling will not make a man a bankrupt, for it must be a repeated practice, and profit sought by it: and on the same principle, no handicraft occupation (where nothing is bought or sold, and so an extensive credit for the stock in trade, is not necessary to be had) will make a man a regular bankrupt; as a gardener, gold-beater, &c. who are paid merely for their work and labour.

So where a schoolmaster bought books and shoes which he sold to his scholars at an advanced price, it was ruled that he was not a trader within the meaning of the bankrupt laws.

But

But where persons buy goods and make them up into saleable commodities, though part of the gain is by bodily labour, and not by buying or selling, yet these are within the statutes of bankrupts, for the labour is only in melioration of the commodity, and rendering it more fit for use; therefore, according to the doctrine before delivered, a *mere working taylor* cannot be a bankrupt; but a merchant-taylor, who buys cloth, and makes it up for his customers, may be a bankrupt; and so of other trades, as bakers, brewers, clothiers, &c.

So the court of *B. R.* held, "That a *butcher* might be a bankrupt."

2. "Neither is it necessary that *the trade be lawful*, in order to make the trader a bankrupt."

As where a commission of bankrupt issued against a *clergyman*, and he petitioned to have the commission superseded, on the ground that, by statute 21 *H. 8. c. 13.* "All spiritual and ecclesiastical persons are forbidden to follow any trade, or buy or sell for gain, under a penalty:" but Lord *Hardwicke* was of opinion, That this penalty only attached against himself, and that he was liable to the bankrupt laws, the trading being proved.

So in the same case he held, That a person who dealt merely in *smuggling and running of goods*, though this was an offence, and contrary to an act of parliament; yet still that it was a trading within the statutes; for that in both cases a person should not take advantage of the breach of one law to excuse him from the breach or another.

3. The statute 5 *Geo. 2.* having declared that *brokers* might be bankrupts, Lord *Hardwicke* was of opinion, that *pawn-brokers* were included, and might be bankrupts; for though they are not expressly named, yet the word *broker* is the genus, and all other kinds of brokerage the species.

"4. Though the statutes mention persons only *using trade*, &c. as objects of the bankrupt laws, yet if *persons in other professions or employments*, however seemingly inconsistent, will do any acts of trading with a *view to profit*, they shall be subject to the bankrupt laws."

As a *gentleman of the bar* who had a colliery, and dealt in coals in *Durham*, was held to be a trader within the bankrupt laws.

So though a man be a *public officer*, as an *exciseman* or such like, yet if he will trade, he makes himself subject to the statutes of bankrupts.

So a commission of bankrupt formerly issued against a *peer*, an *Earl of Suffolk*, for trading in wines.

5. "*Drawing and re-drawing bills of exchange*, is an act of trading that will subject the party to a commission of bankrupt; but such should not be on a *person's own and sole account*, but *with the money of others* to make a profit."

For in this case, which was an issue out of chancery, to try if one *Wilson* was a trader within the bankrupt laws, it appeared that he was an army agent, and that he was for many years in the habit of drawing bills of exchange on a Captain *Johnson* of

2 Black. Comm.
476.
1. *Atton v. Bigg.*
Skian. 292.

3 Mod. 330.
Dally v. Smith,
4 Burr. 2048.

Ex parte Mey-
mot.
1 Atk. 196.

Ibid.

Highmore v.
Mulloy,
1 Atk. 206.

1 Stra. 514.

Per Lord Hard-
wicke.
1 Atk. 206.

1 Atk. 101.

Richardson v.
Bradshaw,
1 Atk. 128.
quot. Cowp.
750.

Dublin, who was likewise an army-agent, to a large amount, and Johnson to re-draw upon him. But it appeared further, that *he also received money from officers, their widows, and others*, which he kept for them, and for which they drew on him; but that when he had a large sum he did not keep it in the house, but paid it into Drummond's bank, on which he gave checks for any large payments he had to make: in this case the jury found him to be a trader, and the judgment was given accordingly, on the ground of the profit he derived from the exchange, and the use of the money of others.

Hank v. v.
Jones, Cowp.
745.

But where a person, engaged in expensive works, drew bills on different persons, for the purpose of raising money for those works, but allowed to the persons who accepted his bills a quarter *per cent.* commission, besides interest at 5*l. per cent.* and also borrowed accommodation-notes in exchange for his own, he was held not to be within the bankrupt laws; for all the transactions of the bills was on *his own account, and for his own benefit only.*

6. "The words of the statute of bankrupt being, *Using the trade of a merchant by buying and selling,*" the act of buying and selling must be *in the way of a merchant.*"

Crip v. Pratt,
Cro. Car. 549.
Newton v.
Trigg,
Salk. 110.
Per Holt,
Salk. 110.

Therefore an *innkeeper* as such cannot be a bankrupt, for his living is not principally got by buying and selling, but by *the use of his rooms and furniture*; and he buys meat and drink, not for sale or trading, but for accommodation: neither does he *buy or sell at large* as a merchant, but to guests only: "For wherever a man buys or sells *under a particular restraint or limitation*, he is not a seller within the statute, for the statute is selling in the *way of merchants*; that is, *indiscriminately and generally to all.*"

Saunderson v.
Rowles,
4 Burr, 2065.

On the same ground that an innkeeper has been held not be an object of the bankrupt laws, a *viñtaller* who sells liquor only *in his own house, or out of it in small quantities*, as by the pot or mug, is not a trader within the bankrupt laws.

"But in this case, it must be taken that the selling out of the house was rather to oblige customers than as a *means of living*; for though a person follows the trade of a viñtaller, yet if he also deals in liquors which he sells indiscriminately, whatever the quantity, he may be a bankrupt."

Patman v.
Vaughan,
1 T. Rep. 572.

For where a person kept a public-house or inn, and during the time he was in business, which was about nine months, sold six gallons of spirits altogether; but it appeared that *any person* applying for liquors might have been supplied: Judge Buller left it to the jury to decide, Whether this was not a trading? and they found the party a bankrupt. And in this case the same justice ruled, That the *quantity sold* was immaterial to the question; for if he had dealt largely he would not probably be a bankrupt.

"But, however, it may perhaps be proper to take into consideration *the proportion* which the business of selling liquors out of doors bears to the business as an innkeeper or viñtaller, that it so may appear to be done with a view to seeking a living."

Rogers v. Hogg,
3 Wils. 146.

For where in this case the person was an innkeeper, but was proved to have sold often large quantities of wine, rum, and

and brandy to different persons which many after retailed again, the judge nonsuited the plaintiffs who were the assignees, holding such person not to be an object of the bankrupt laws; but the Court set aside the nonsuit, holding the doctrine now laid down that at the trial the proportion of his dealings out of doors as an innkeeper, should have been taken into consideration, and left to the jury.

And in this case it was held, That the purchase of one lot of timber with intent to sell again, will make a man a trader.

Holroyd et al:
Aff. of Lee
v. Gwynne,
Taunton's Rep.
p. 176.

7. "The stat. 5 Geo. 2. having declared farmers, graziers, and drovers to be not objects of the bankrupt laws; on this part of the statute it has been decided,"

1. If a person buys cattle at a fair, keeps them three or four days on his land, and then drives them to another fair to sell them, he is a *drover* within the statute.

Miles v.
Hughes, Mich.
19 G. 2. C. B.
Bull. N. P. 39.

2. "But though a farmer, merely as such, is not an object of the bankrupt laws, yet if he buys any great quantities of things, such as are the produce of his farm, and sells them, he shall be liable to a commission of bankrupt."

As where a special verdict found that one *Richard Baxter* had occupied a farm of 300l. a-year, and annually planted it with many acres of potatoes, which he sold for gain, and likewise bought from others large quantities of potatoes, which he kept in warehouses, and sold again at different markets. His dealing so extensively and in such manner, was held to make him a trader within the meaning of the bankrupt laws.

Mayo v. Arch,
1 Stra. 513.

So where the plaintiff was assignee of one *Davis*, who, it appeared, rented a considerable farm at *Whitchurch*, and kept two or three teams of horses, that previous to his taking the farm he had lived with an uncle, during which time he attended fairs, and bought and sold several horses; and after he took the farm, he occasionally attended fairs, and bought horses which were not calculated for the farming business, and which he always sold again for some profit. On this evidence the Judge left it to the jury to decide, Whether the dealing in horses was not distinct from the farming business, and done with a view to profit? and the jury found *Davis* a bankrupt; which verdict on a motion for a new trial was afterwards confirmed by the court.

Bartholomew
v. Sherwood,
Mich. 27 G. 3.
quot.
1 T. Rep. 573.

But an occasional buying hay, corn, horns, &c. by a farmer, although with a view to sell again, will not make the party a trader.

Stewart v. Ball,
2 N. R. 78.

So it was in this case held that a farmer and grazier, exercising the business of a drover also, by buying and selling cattle from time to time beyond the occasions of his farms, was not an object of the bankrupt laws under that statute. Neither was the buying hay, part of which he sold again, it being more than was required for the use of his cattle.

Bolton v.
Sowbery,
11 East, 274.

"In the cases in which a farmer has been held to be an object of the bankrupt laws, the person carried on a business independent of the merely using the land; for where the whole trading arises from the land itself or its profits, the person cannot be a bankrupt."

Port v. Turton,
2 Will. 169.

As where the person against whom the commission was sued out, was proved to have *purchased a coal-mine, worked it, and sold the coals*, he was held not to be a trader within the statutes of bankrupt.

Newton v.
Newton,
9
2 Will. 170.
1 T. Rep. 34.

So where a person purchased *allum-works*, the same decision took place.

“ For where a person exercises a manufacture from the produce of his own land, *as a necessary and usual mode of enjoying the produce of that land*, he shall not be considered as a trader within the bankrupt laws, though he buys the necessary ingredients to fit it for market. But where the produce of the land is merely the *raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land*, there he is a trader within the bankrupt laws.”

Wells v. Parker,
1 T. Rep. 34.

Therefore where a person rented a piece of ground *merely and solely for the purpose of making bricks for sale*, the Court of King's Bench held that he might be a bankrupt; but this case afterwards went off on another point in the House of Lords.

Sutton v.
Weely,
7 East, 442.

But a person using his own estate as a brick ground, and selling the bricks made there, will not make a trader subject to the bankrupt laws.

Ex parte Harri-
son, Brown
Ch. Cal. 173.

So where it was proved, That the person declared a bankrupt was a farmer, and rented 100*l. per ann.* and made bricks of earth, taken off the waste without any licence from the lord (but for which he afterwards paid a consideration) that he used a kiln not built by himself, and had at various times made from 40 to 70,000 bricks every year, and sold different quantities, sometimes to particular persons only, and sometimes generally to all who came: it was held, that this being not to improve his own estate, nor in the usual mode of enjoying it, but a purchasing of the materials for carrying on a trade, that therefore he was an object of the bankrupt law.

Dodworth v.
Anderson,
1 Ld. Raym. 375.

“ 8. A person may be a bankrupt who has traded with this country, *though he has resided entirely abroad*, and whether he be a native or a foreigner.”

Ex parte Smith,
Cowp. 402.

As where it appeared that one *John Ashley* went from *England* in 1720, and *resided in Barbadoes* till 1735, where he was a factor, and planted and *traded to England*, sending the produce of his plantations to *England*, and receiving back goods on his own account, or as factor for others; he came to *England* in 1737, and then committed an *act bankruptcy*: it was adjudged that a commission could well issue, though the trading was abroad.

Alexander v.
Vaughan,
Cowp. 398.

So in this case, where the person against whom the commission issued, was a native of *Scotland*, resided there, and kept an house at *Edinburgh*; he traded with *England*, and very extensively to all parts of the world: he came to *England*, where he was arrested; and having lain two months in prison was declared a bankrupt: he brought an action of trespass, in which all the authorities were considered; and the Court were clearly of opinion that the commission had regularly issued.

Bird v.
Sedgewick,
Salk.

So where a gentleman of the *Temple* went to *Lisbon*, where he turned factor, and traded with this country, he was held to be liable

liable to the bankrupt laws, by reason of his trading and gaining a credit here.

9. The daughter of a freeman of *London*, who trades separately from her husband, or any feme-covert trading separately from her husband in *London*, may by the custom become a bankrupt.

Ex parte Car-
rington,
1 Atk. 206.

And so it should seem that a feme-covert, having a separate maintenance and living apart from her husband, may be made a bankrupt, for she is in such case liable for her own debts.

So where the husband and wife separated, and divided the property they possessed, and her part was assigned to trustees for her separate use, not subject to the interference or controul of the husband, and afterwards she traded; Lord Ch. Bathurst directed her to be found a bankrupt, notwithstanding her coverture.

Cafe of Ann
Fitzgerald,
Green's Bank,
Law. 8.

"But where a feme-sole trades and commits an act of bankruptcy, and afterwards marries, she cannot be made a bankrupt."

Therefore where *Frances Mear* had before her marriage kept an inn in *Birmingham*, by the name of *Frances Piper*, but had declined business in *December* 1784, and in *February* 1785 had intermarried with *Henry Mear*, the act of bankruptcy proved was in *October* 1784, and the commission sued out in *December* 1785; on petition the commission was ordered to be superseded, on the ground of its having issued against a married woman.

Ex parte
Mear,
Cooke B. L. 44.

2. Of the Act of Bankruptcy.

What are acts of bankruptcy are declared by several statutes.

1. By stat. 13 *Eliz. c. 7.* 1. *Jac. 1. c. 15.* "Departing from the realm with a view to delay or defraud creditors, is an act of bankruptcy."

And where a trader whose house of trade was in *Ireland*, came here on business, and being apprehensive of being arrested here, in order to avoid it, quitted this country and returned to *Ireland*, that was held to be such a departing the realm as constituted an act of bankruptcy.

Williams v.
Nunn,
1 Taunt. 270.

"But in this case it must appear that the departure was for the purpose of delaying or defrauding creditors; but if it appears that in fact they are delayed by such departure, it will be the same as if the first departure was fraudulent."

Ex parte
Gulston,
1 Atk. 193.

For where it appeared that the bankrupt had fled and gone abroad for killing his wife, Ch. Just. Reeves held, That shewing *quo animo* it was done, might prevent such departure from being construed an act of bankruptcy; but it appearing in fact that by such departure the creditors were delayed and defrauded, he then held it an act of bankruptcy, though this case might also fall under the second description of acts of bankruptcy, viz.

Cited in Degolls
v. Ward,
Hil. 12 G. 2.
Bull. N. P. 39.
Raikes v.
Porcau,
Sitt. Trin.
26 G. 3.
Cook B. L. 95.
S. P.

2. By stat. 34 & 35 *H. 8. c. 4.* it is enacted, "That withdrawing out of the king's dominions into foreign parts, with intent there to remain and so defraud creditors, and not returning within three months after proclamation, is an act of bankruptcy."

So that under this statute a person departing the realm with the consent of his creditors may be a bankrupt, by remaining abroad, though under the former he could not.

3. A third act of bankruptcy is by stat. 13 *Eliz. c. 7.* and 1 *Jac. 1. c. 15.* which enacts that, "Beginning to keep house, so
" that

"that he cannot be seen or spoken to by his creditors, is an act of bankruptcy."

Under this statute it has been held,

1. "That a trader ordering his clerk or servant to deny him to a creditor, is not an act of bankruptcy, for there must be an actual denial."

Hawkes v.
Saunders,
Trin. 24 G. 3.
Cooke B. L. 96.

For where a trader gave orders to his servant to deny him to his creditor on the 26th of May, but he was not actually denied till the 28th to a creditor, it was adjudged, That the actual denying not the order to deny, constituted the act of bankruptcy; so that he was only a bankrupt from the 28th.

Bull. N. P. 39.
Per Lord Hard-
wicke,
2 Atk. 201.

2. But being denied when at home, though not itself an act of bankruptcy, yet is evidence of it; but in such case it must appear that the denial was *with intent to delay creditors*: for if the party be ill in bed when denied, or the creditors calls at an unreasonable hour of the night, or he is in company, such will be no act of bankruptcy.

"And it seems that by the construction put upon this statute by the courts, that an actual denial to a person calling for a debt is necessary, and required as essential to support the act of bankruptcy last mentioned."

Garrett v.
Maule,
5 T. Rep. 575.

For where it appeared in evidence, that the bankrupt, on the 4th of June 1793, being in insolvent circumstances, and in expectation of having several bills that were due being presented to him for payment, retired up stairs in his house, and gave orders to his clerk to deny him; he was denied to several persons, but it did not appear that they were creditors. On the 7th of June one Ryder, a creditor of his, called at the bankrupt's house about other matters; but understanding that he was from home, did not ask for him. He continued in the house half an hour in conversation with the clerk, with the knowledge of the bankrupt, and asked if his wife could not give him part of his debt, but was denied. This was held not to be an act of bankruptcy, as there was no actual denial to a creditor.

"And where a trader gives general orders to be denied and is denied, but discovering who he is who called, immediately follows him, and meets him, it is an act of bankruptcy, and not purged by his afterwards seeing him."

Mucklow Aff.
of Royland v.
May,
1 Taunt. 479.

For where the bankrupt in this case had given such orders, and one Eyre called, who was a creditor, and was told that the bankrupt was not at home. Eyre left word that he wanted to see him, and would wait at the adjoining public-house. The bankrupt came there to him in two minutes, Eyre said, "Why did you deny yourself: you need not be afraid of me?" He answered, "I was not afraid of you, but I was afraid of Hill." Hill was at that time a creditor. This was held to be clearly an act of bankruptcy.

Field v. Bellamy,
Hil. 15 G. 2.
Bull. N. P. 39.

3. And on the same ground where the person was denied by agreement, in order to ground a commission on it, Ch. Just. Lee held it not to be an act of bankruptcy.

Though here, where the case was, that the party (in consequence of an agreement made at a meeting of the creditors two hours

hours before, at which he and the plaintiff were both present) was denied to the plaintiff's clerk who came to demand money, Justice *Foster* held this to be a sufficient act of bankruptcy. But Judge *Buller* in his *Nisi Prius*, puts this with a *quere*. Perhaps the distinction may be, that the parties who have so concerted the act of bankruptcy cannot afterwards say, that the commission was fraudulently taken out: but such act would be sufficient for persons not privy to it.

And it was ruled in this case by Mr. Just. *Buller*, at *Guildhall*, according to that distinction: the action was *trover*, for goods taken in execution; and the question was on the time of committing the act of bankruptcy: he ruled, That if a man leagues with some of his creditors, and keeps house with intent to commit an act of bankruptcy, and is accordingly denied to one of such creditors, it is a fraudulent act of bankruptcy, and will not support the commission: but if the creditor calling be not a party to, nor acquainted with such agreement, it shall not operate to his disadvantage; and the denial will be good evidence of an act of bankruptcy.

And where *being denied* is the act of bankruptcy relied on, circumstances may be shewn that he *did not do it to avoid payment*, but on account of sickness or particular business.

4. "So the denial must be *to a creditor*."

For though a man, with intent to delay his creditors, orders himself to be denied, yet unless he in fact be denied to a creditor it is no act of bankruptcy; therefore it is necessary to prove that the person denied was a creditor.

And in this case it was held, That being denied to a person who came on behalf of a creditor was not sufficient, though it was given in evidence that the bankrupt was afterwards denied to many creditors, and so continued to be till the commission was sued out.

But a clerk calling with a bill of the house to which he belongs, is a sufficient creditor, within the meaning of these cases, as I have often seen in practice.

Where the act of bankruptcy is a denial to a creditor, a witness proving that several persons called and inquired for the bankrupt, whom the witness believed to be creditors, but could not say in fact whether they were so or not, was ruled by Lord *Kenyon* to be evidence to go to the jury, whether, in fact, the persons calling were creditors, or not.

5. And so it must appear that a *debt is actually due*: as if a creditor by *note payable at a future day* calls, being denied to him, is not an act of bankruptcy, as he is not *then* a creditor.

6. But a *banker's* stopping or refusing payment is not an act of bankruptcy, for it is not within the description of any of the acts of bankruptcy, and there may be good reason for doing so; as suspicion of forgery or the like. And if in consequence of that refusal he is arrested and puts in bail, it is no act of bankruptcy.

Bromley v. Munde,
G. Hall, 2d
June 1756.
Bull. N. P. 39.

Cowley v. Hopkins,
Sitt. Mich. 178c.
Cooke B.L. 105.
Stewart, Aff. v. Richman,
Esp. N. P. Caf.
108. S. P.
Roberts v. Teafall,
Peake;
N. P. Caf. 27.

1 Burr. 484.

Jackman v. Nightingale,
Pach. 13 G. 2d
Bull. N. P. 40.

Barrow v. Forster, per
Lord Camden,
Norwich Sum.
Aff. 1765.
Green's Bankrupt Law, 45.

Jamefon v. Eamer,
Esp. N. P. Caf.
381.

Per Ld. Talbot,
7 Vin. Abridg.
61.

Mofely, 3.
7 Vin. Abridg. 6.
pl. 12. in marg.

4. "Departing from his dwelling-house, with intent to delay and defeat creditors in the recovery of their debts, is another act of bankruptcy by stat. 13 *Eliz. c. 7.* and 1 *Jac. 1. c. 15.*"

Helroyd v. Gwynne,
2 Taunt. 177.

And a trader who has no settled home or counting house, but takes up a temporary abode at a public-house, in the place to which his business carries him, commits an act of bankruptcy by departing from such public-house, with intent to delay his creditors.

Upon this clause of the statute it has been held,

Maylin v. Elyoe,
2 Stra. 809.

1. That where it appeared that the bankrupt had gone out of town on the morning of the 28th of *November* and returned in the evening, before which time a bailiff had been at his shop to arrest him, and the next morning he sent for the bailiff and told him, that he had gone out of town that day in order to get the term of the plaintiff; and now that the return of the writ was out, if he would take out a new writ, that he would give bail; which was done accordingly. This was held to be clearly an act of bankruptcy, being a departing from the house with intent to *delay and defraud a creditor.*

Bernard v. Vaughan,
8 T. Rep. 149.

It was in this case held that to constitute an act of bankruptcy under this clause of the statutes, that it is necessary that a delay to a creditor should take place. And this case decided, that a refusal to admit a sheriff's officer, who came with an execution after the bankrupt had left his house, was not such a delay as constituted an act of bankruptcy; for no creditor had been actually delayed.

Robertson v. Sir Thomas Liddell,
9 East, 487.

This case was, however, much doubted. *Vid. Cook B.L. 102.* and *Cas. ibid cit.*; and subsequent cases have over-ruled it: and it has been said that Lord *Kenyon*, before whom that case was decided, said, that the real ground of decision in *Bernard v. Vaughan* was, that the plaintiff left her dwelling-house to avoid the inconvenience of being there with the sheriff's execution, and not to avoid her creditors. But it is now clearly held, that if a trader leaves his house with an intent to delay his creditors, it is an act of bankruptcy, though no creditor calls and is delayed.

2. "But the absenting himself must be to avoid the payment of a debt."

Com. Dig. 523.

For if a man absents himself for fear of being arrested by an attachment out of chancery for non-payment of money decreed, that will make a man a bankrupt.

Ibid.

But if a man absents himself for fear of being arrested by a *capias de excommunicato capiendo*, that will not make him bankrupt.

Lingood v. Eade,
1 Atk. 196.

So in this case Lord Ch. Just. *Willes* was of opinion, That a person's absconding to avoid an attachment for non-performance of an award, in not delivering goods in pursuance of the award, was not an act of bankruptcy; for it was not within the words of the stat. 1 *Jac. 1. c. 15.* which makes it an act of bankruptcy in a person to keep out of the way, or depart from his dwelling to avoid the payment of a just and true debt, but the delivery of goods was rather a duty; and Lord *Hardwicke* afterwards

wards recognized this distinction between a debt, and a duty, as the true one.

3. So the absenting himself must be *voluntary*; which if done but for a single day, for the purpose of delaying his creditors, it is an act of bankruptcy; but if the *departing was involuntary*, as under an arrest, such is not an act of bankruptcy.

Phillips v.
Sheriff of ETex,
Green B. L. 53.

4. In this case it was decided, That it was not sufficient to constitute an act of bankruptcy under this clause of the statute, that the creditors have been delayed by a trader's departing from his house; for the finding of the jury being, "That they thought the intent of the plaintiff in going to London was laudable, and that he had no intent of delaying or defrauding his creditors, but that delay did actually happen to some creditors."—It was held not to be an act of bankruptcy.

Fowler v.
Padget,
7 T. Rep. 509

5. "Another act of bankruptcy is, being arrested for debt and lying in prison two months on that or any other arrest or detention for debt, which makes him a bankrupt from the time of the first arrest: or willingly and fraudulently procuring himself to be arrested." By stat. 1 Jac. 1. c. 15. and 21 Jac. 1. c. 19.

Under this part of the statute it has been held,

1. The *arrest must be lawful*, therefore an arrest by an execution before probate, is not an act of bankruptcy.

3 Lev. 58.

2. That though the words of the statute are, that he shall be a bankrupt *from the time of the first arrest*, yet that if a trader is arrested and puts in good bail, but afterwards surrenders himself in discharge of his bail, he shall only be a bankrupt *from the time of his surrender*.

Came v.
Colman,
Salk. 109.
Friebe v.
Webber,
Hil. 17 G. 2.
C. B. Bull. N. P.
38. S. P.
Rose v. Green,
1 Burr. 437.
Bull. N. P. 39.
S. C.

But where *sham-bail* is put in before a judge as a means to get defendant turned over to the prison of the court, and he is *instante* surrendered by his bail, this shall be considered a mere evasion and a continuation of the first arrest; and the bankruptcy shall relate *to the first arrest*.

3. It has been decided in one case, that lying in prison two lunar months will make the party a bankrupt from the time of the first arrest: and though the commission was taken out before the two months expired, yet he appearing to be a bankrupt by relation to a time before the suing it out, it was held sufficient.

Hope v. Gill,
Beaves, 489.
cit. Cook B. L.
121.

This case is now not law.—For though an act of bankruptcy has relation back to the time of the arrest, no commission can be sued out until the two months are expired.

Gordon v.
Wilkinson,
8 T. Rep. 507.

And in such case the day of the arrest is to be reckoned the first of the 56 days, or two lunar months.

Glasfington v.
Rawlins,
3 East, 407.
1 Burr. 439.
Com Dig. 523.

4. To make the *procuring one's self fraudulently and willingly to be arrested* an act of bankruptcy, it must be on a *feigned action or sham-debt*.

6. Another act of bankruptcy is, "After having been arrested, *escaping* where the debt is 100l. or suffering himself to be out-lawed." By stat. 21 Jac. 1. c. 19.

1. But an escape to become an act of bankruptcy under this clause in the statute, must be *against the consent of the sheriff or officer*;

1 Ld. Mansfield,
1 Burr. 440.

officer; such an escape as is criminal, which shews the party intended to run away and defraud his creditors; not a constructive one, as being out of the sheriff's bailiwick, in passing through a different county in the custody of the sheriff.

Rose v. Green,
1 Burr. 437.

As where the person was arrested in *Kent*, and was brought up by *habeas corpus*, in order to be turned over, and on the road to the judge's chambers, was permitted, at his own desire, to call at his attorney's house in *London*, which was out of the county of *Kent*; he was from thence carried to a judge's chamber and there bailed, and then surrendered: it was held, That this was no *escape* within the meaning of the statute.

Croxtan v.
Hodges, per
Fortescue at
Hereford,
4 G. 2.
Bull. N. P. 40.

2. But under these several clauses of the different statutes with regard to acts of bankruptcy created by arrests, it is to be observed, that a person's giving money for notice when a writ comes into the sheriff's office against him, is no proof of an act of bankruptcy: for he may do it to prevent his credit from being blown.

Per *Ld. Mans-*
field,
Cowp. 428.

7. By stat. 1 Jac. c. 15. "Willingly or fraudulently procuring his goods or chattels to be sequestered or attached, is another act of bankruptcy."

Com. Dig. 523.

The word *attachment* being coupled with sequestration and arrest, means that sort of attachment and sequestration which it is the custom of *London* and other cities to use.

Harman v.
Spotswood,
Mich. 3 G. 3.
B. R. Cooke
B. L. 126.

But this attachment or sequestration must be by his own procurement; for it is no act of bankruptcy if done without his knowledge.

Therefore in an issue out of Chancery, to try the time of a bankruptcy, the case was, *Gray* the bankrupt had borrowed money of *Spotswood*, the defendant, upon a bond and warrant of attorney; *Spotswood* entered up judgment and sued out execution, which was executed the 5th of *April*: the transaction was however kept secret, and the officer in possession appeared to be an indigent relation of *Gray's*, who carried on his business as a coachmaker till the 25th of *May*, when he was arrested, and then an inventory was made out and the goods sold, the money remaining in the sheriff's hands: during the time the bankrupt remained in possession he contracted large debts and paid to the defendant on divers accounts 1300*l.* which was more than double the debt on the judgment, that being only 500*l.*: it did not appear in evidence that the judgment was entered up, or the execution sued out at the instance of the bankrupt: the Court were of opinion (the jury having found that the debt was *bona fide*, and the execution adverse) that the execution could not be deemed an act of bankruptcy.

Cooke B. L.
106.

8. "Another act of bankruptcy is suffering himself to be outlawed." By stat. 1 Jac. 1. c. 15.

Radfords v.
Bludworth,
3 Lev. 13.

But an outlawry in *Ireland* does not make one a bankrupt here, though an outlawry in *Durham* does.

But to make an outlawry an act of bankruptcy, it must appear to be suffered with an intent to defraud creditors.

9. By stat. 1 Jac. 1. c. 15. "it is further enacted as an act of bankruptcy, for a trader to yield himself to prison."

This

This means a voluntary yielding for *debt*; and if a person capable of paying, will notwithstanding, from fraudulent motives, voluntarily go to prison, it is an act of bankruptcy.

Therefore where a trader was arrested for 28*l.* and having sufficient to pay it; yet chose rather to go to prison, in order, as he said, to compel his creditors to come to a composition, the Chancellor said, This is an act of bankruptcy within 1 Jac. 1. though without such *intent*, yielding himself to prison was no act of bankruptcy, unless he lay two months: otherwise where the party procures himself to be arrested for a sham-debt, for that by stat. 1 Jac. 1. c. 19. is an act of bankruptcy.

10. Another act of bankruptcy is under stat. 1 Jac. 1. c. 15. "Making any fraudulent grant or conveyance of his lands, tenements, goods, or chattels."

Under this statute it has been held,

1. That the conveyance which shall be an act of bankruptcy under this head must be *by deed*; and a *fraudulent judgment and execution* though void against creditors, is not an act of bankruptcy.

2. Every assignment by a trader who becomes insolvent is not an act of bankruptcy; for a bankrupt may lawfully prefer one creditor to another, as he may make a mortgage to him; but it *must be with possession delivered*, except in the case of a ship at sea. So the bankrupt may assign over *part* of his property to a fair creditor in discharge of his debt, and it shall be good.

As where *Hooper* the bankrupt, being fairly indebted to the plaintiff, who was his mother, in 800*l.* but finding himself declining, before any act of bankruptcy, assigned to her a parcel of silks, amounting to about 350*l.* which was about *half his stock in trade*: of this he made a bill of parcels with a receipt, as if sold in the ordinary course of trade, and afterwards conveyed the goods to her. In the evening of the same day, it was agreed that he should deny himself, and so become a bankrupt. The assignees having possessed themselves by stratagem of all the silks so assigned to her, she brought *trover*; and the question was, whether the assignment was an act of bankruptcy, and fraudulent? The doctrine laid down by Lord *Mansfield* was, That if a man having previously committed an act of bankruptcy, in order to pay even a just debt, *assigns all his effects* to the creditor, or all to several creditors, in *exclusion of any one or more*, that *that* is an act of bankruptcy; but that a preference by assignment to one creditor of *only part* of his goods, and that to pay only part of the debt, has been frequently held good. Though if a man makes over so much of his stock as disables him from being a trader, it would be fraudulent; but to say in the present case that that part of the stock would have that effect, would be going too far.

And a conveyance by deed to a child of the bankrupt, though declared to be void by stat. 1 Jac. 1. if made *by a trader when he is insolvent*, is fraudulent, and an act of bankruptcy.

"Though the law allows the creditor, by using due diligence and by threats of legal proceedings to obtain payment of their demands, or even a satisfaction in specie, still from peculiar circumstances,

Ex parte
Burton,
Vin. Abr. Tit.
Creditor, 62.

Clavey v. Hay-
ley, Cowp. 427.
Martin v.
Pewtreffs,
4 Burr. 2478.
Wilson v. Day,
2 Burr. 827.

Smith v. Payne,
6 T. Rep. 152.

Hooper v.
Smith,
2 Bl. Rep. 441.

Whitwell et al.
Assignees of
Stephens et al.
v. Thompson,
Esplin. N. P. Cal.
68.

"circumstances, it may happen that such an assignment may be fraudulent and void."

Smith, assignee
of Hamilton and
Payne.

Therefore, in this case, where the defendant obtained books from the bankrupt, who was a bookseller, in discharge of his debt, the debtor being then unable to pay him money, was held to be good.

Hartshorn v.
Slodden,
2 Bof. & Pull.
582.

So in this case, where the bankrupt was indebted to the defendant by bond not then due, and the bankrupt gave the defendant, who pressed for payment, shop goods to the amount of the bond, and they not in the way of the defendant's trade, the Court of Common Pleas held, that the defendant might keep the property so obtained, it having been so got by threat of legal proceeding.

Thornton v.
Hargrave,
7 East, 544.

Yet in this case, (in which those former cases were relied upon,) where a trader pressed for payment by his creditor, or for security, one or other of which he said he'd have; and the trader gave a bill of sale of certain wools and clothes at a mill, apparently his whole stock, and immediately left his home and business, and became a bankrupt, as this did not redeem him from any present difficulty, which is the usual motive for such an act when done under the influence of a threat, it was held to be evidence that it was done voluntarily and to prefer such creditor, and was therefore void; and *per Lawrence Justice*, If the bill of sale swept away the whole of the bankrupt's property it would be difficult to say that it was not made in contemplation of bankruptcy: because it would be in itself an act of bankruptcy; and if so made in contemplation of bankruptcy, he must have intended to give a preference to particular creditors.

The doctrine above laid down has been confirmed by many cases. As,

Assignees of
Sladers v.
Demattos,
5 Burr. 567.

1. An assignment by a trader before an act of bankruptcy, of *all his property, real and personal*, though given by way of security, and for a valuable consideration, was in this case adjudged to be a fraud on the bankrupt laws, and an act of bankruptcy.

2. "A colourable omission of part of a bankrupt's property, *if he assign all his stock and trade*, is an act of bankruptcy."

Law v. Skinner,
2 Bl. Rep. 996.

The bankrupt in this case assigned in consideration of 300*l.* two leasehold houses and *all his stock in trade* to the plaintiff to secure that sum, but *the household goods and debts were not included*, the mortgage was forfeited, and in consideration of 40*l.* he bargained and sold his household goods, *but not the debts* (which were trifling) to the plaintiff to secure the 340*l.* The assignees took possession of the goods, on which the plaintiff brought trover, and on a special case made, the Court determined that the assignment was an act of bankruptcy, for it being all his stock in trade, he could not carry on business longer.

Gayner's case
cited,
1 Burr. 477.

3. An assignment of the bankrupt's property *to the exclusion of any of the creditors*, is an act of bankruptcy. As was held in this case, where one Gayner, a trader, on the 7th of June, made an assignment of all his effects, goods, stock in trade, &c. (except his household furniture, watches, plate, bills, and cash then by him)

him) to trustees, in trust to pay themselves, and all the rest of the creditors, except *Ford* the petitioner; the trustees declining to act under this assignment, he executed another on the 9th of June, wherein the trustees were to pay themselves, and all the creditors mentioned in the schedule (in which Mr. *Ford's* name was not omitted) and in this assignment a large parcel of ginger was excepted. On this coming before Lord *Hardwicke*, he was clearly of an opinion, that the deed of the ninth of June was of itself an act of bankruptcy.

A general assignment to trustees for the benefit of all the creditors of the bankrupt, is an act of bankruptcy.

In trover against a sheriff who had levied an execution on the bankrupt's goods; to prove an act of bankruptcy prior to the execution, the plaintiffs relied on an assignment made by the bankrupt of all his effects to two of his creditors, in trust for themselves and the rest of the creditors, in consequence of a proposition made by the bankrupt at a meeting of his creditors, and accepted by all present. *Per Lord Mansfield*—“This deed is a fraud on the bankrupt-laws, and is an act of bankruptcy, unless every creditor concurred, which here is not the case, the plaintiff in execution being adverse.”

Kettle et al. Ad. v. Hammond, Sittings after Hil. 7 G. 2. Bull. N.P. 47.

It is now perfectly settled that a deed of assignment by a trader of all his effects, though for the general benefit of his creditors, is an act of bankruptcy, fraudulent and void.

Eckhardt v. Willon, 8 T. Rep. 140.

“But such a deed cannot be used as an act of bankruptcy, by those creditors who join it, though it may be by another creditor who did not, and if a commission is sued out on it, creditors who joined in the deed may be assignees.”

As where creditors prevailed upon a trader to do so with the express view of making him a bankrupt by the deed, and not intending to act under it, and these creditors were afterwards chosen assignees together with the petitioning creditor, who was not concerned with them in the deed, it was resolved, that that was no objection whatever to the bankruptcy, though such creditors could not be petitioning creditors, for the petitioning creditor had not been a party to the deed.

Tappenden et al. v. Burgetts, 4 East, 230.

So a bill of sale made to a particular creditor of all the effects of a trader, in trust to satisfy his debt, and pay the surplus, if any, to the trader, is an act of bankruptcy, though made while the trader was in custody at the creditors suit, and cannot operate as a conveyance.

Newton v. Chaudler, 7 East, 138.

4. “But it should seem that those partial assignments must be made only with a view to satisfy particular creditors to whom they are made, for if done for the purpose of defrauding the other creditors, and to give an undue preference, or made under circumstances when the trader cannot longer stand his ground, they are fraudulent, and acts of bankruptcy.”

Therefore, where the defendants, who were mercers in London, on the 7th of April sent goods to the bankrupts, down into the country, and gave them credit for them in their books: on the 18th of May, the bankrupts, without the knowledge of the defendant, sent the same goods to a third person for the use of the defendants; and on the fourth of June became bankrupts: on the

Atkins v. Barwick, 1 Stra. 165. Vid. Salte v. Field. ante 539.

6th of June they wrote to the defendants, informing them that their affairs being declining, that they had so disposed of the goods for their use. This letter was received on the 13th of June, and on the 9th this commission had issued: immediately after receiving the letter, the defendants signified their assent to it: on *trover* by the assignees, it was held, That the debt due was a good consideration; for thus transferring the goods was good as a satisfaction of debt, and that the property thereby passed out of them and reverted in the defendants until they shewed their dissent, which should not be presumed, it being for their interest; so that they might hold them against the plaintiffs (the assignees).

"The law however in this case of *Atkins v. Barwick* has been doubted to the full extent which it seems to import: and the rule seems to be, that it can be law only as considering that the bankrupt *never accepted* the goods as sent to him."

*Neate Aff. of
Sandwell v.
Ball, 2 East, 117.*

For in this case, where he did receive them into his warehouse and weighed them, though it was proved to be the course of dealing between him and his consignor to be at liberty to return the goods sent to him, if he thought fit; and the goods were sent back before an act of bankruptcy committed, and the case of *Atkins and Barwick* was relied on: yet it appearing that he was in distressed and insolvent circumstances at the time, it was decided, that he could not give such a preference by restoring the goods to the consignor.

*Devon v. Watts,
Dougl. 86.
Linton v.
Bartlett,
3 Will. 47. S. P.*

But where a trader *being in insolvent circumstances*, and unable to pay more than eight shillings in the pound, made an assignment, *in contemplation of a bankruptcy*, of a lease to certain of his creditors, this was adjudged to be an act of bankruptcy, though it was an assignment of but *part of his property*.

*Harman v.
Fisher,
Cowp. 117.*

So where the defendant having, in order to support the credit of the bankrupt's house, immediately before its stopping, lent the bankrupt 5000l., and he, on the evening before he absconded, inclosed bills to the defendant to the amount of 5000l. in a letter, in which he mentioned his having done so, as conceiving him *entitled to a preference*, the money was recovered back from him by the assignees.

*W. Jewell et al.
Assignees v.
Thompson,
Espin. Cas. N. P.
71.*

Where one partner makes a fraudulent grant by deed of his shop effects to another partner, it is an act of bankruptcy in the former, but not in the latter.

*Rust v. Cowper,
Cowp. 629.*

"The Court therefore allows no evasion of the statute."

As where the bankrupt made a *pretended sale* of part of his effects to his creditor, but which were *not in the way of the creditor's trade*, nor was there *any application or pressing for payment by the creditor*, but done by the bankrupt to give him a preference, it was held to be fraudulent. *Vid. Atkins v. Barwick, ante.*

*Hague v.
Rolleston,
4 Burr. 2174.*

And even if the assignment is in the way of the creditor's trade or business, yet if it is done *in contemplation of a bankruptcy*, it is void.

*Alderson v.
Terrie,
4 Burr. 2235.
S. P.*

But if a trader, being fairly indebted and *apprehensive of being sued*, before any act of bankruptcy, delivers over to his creditor part of his property, though in fact his *apprehensions are groundless*, yet is the assignment good.

But

But an assignment by a trader, when resident abroad, of all his effects in trust for creditors in certain proportions, is not an act of bankruptcy upon which a commission may be sued out, for such should be in *England*.

Thompson v. Freeman,
1 T. Rep. 155.
Inglis v. Grant,
5 T. Rep. 530.

10. Under this division, of the act of bankruptcy by fraudulent grant, I have collected the cases, as well where there has been a fraudulent grant *by deed*, which is an act of bankruptcy in itself, as where there has been a fraudulent delivery of the bankrupt's property by him by way of preference. This latter is not an act of bankruptcy; but the goods so delivered, are recovered back by the assignees, on the ground of a fraudulent preference, though delivered previous to an act of bankruptcy. (*Vid. Lord Mansfield's* opinion as delivered in *Alderson v. Temple*, 4 Burr. 2235. and 1 Black. 441.) To this head the cases of *Rust v. Cowper*, 629. *Hartshorn v. Slodden*, *Smith v. Hamilton* and others, *ante*, apply, and the following:

Where the defendant having discounted three bills for the accommodation of a bankrupt, whom he knew had not long before compounded with his creditors, and was in difficult circumstances, and suspecting when the bills became due he would be unable to take them up, procured him to deliver to him goods to secure him. This was held to be unimpeachable, being in consequence of the defendant's application for finding security: and *per Lord Ellenborough*, "The circumstance of the debt secured, not being then demandable or capable of being enforced at the time, make no difference; which was so decided in *Hartshorn v. Slodden*, and *Thompson v. Freeman*, 1 Term Rep. 155. *supra*."

Crosby v. Crouch,
10 East, 256.

11. "Obtaining any protection otherwise than being lawfully protected by privilege of parliament, is another act of bankruptcy." By stat. 21 Jac. 1. c. 19.

Of this sort was the entering into the service of an ambassador. But now, by stat. 7 Ann. c. 12. it is enacted, "That any person being a merchant or trader, who shall go into the service of any ambassador or foreign minister, shall not have any privilege."

But if any one be protected as a king's servant, it is not an act of bankruptcy. Skin. 21.

12. Another act of bankruptcy is "Paying to petitioning creditor, or delivering to him goods or security for his debt, whereby he shall have privately more in the pound than other creditors." By stat. 5 Geo. 2. c. 30. § 19.

Vernon v. Hankey,
Sitt. G. Hall,
Tr. 27 G.
Cooke B.L. 125.

13. "Neglecting to make satisfaction for any just debt to the amount of 100l. within two months after the service of legal process, upon any trader having privilege of parliament, is another act of bankruptcy." By stat. 5 Geo. 2. c. 30. § 24.

But it is further enacted by statute 4 Geo. 3. c. 33. 1. "That before any commission can be sued out against a member of parliament, it is required, That the creditor make and file on record in one of the courts at *Westminster*, an affidavit, that the debt is justly due to him, and that his debtor, as he very believes, is a merchant &c. and within the description of persons who are objects of the bankrupt laws."

Hopkins v.
Ellis.
Salk. 110.

And note, That if a man commits a *plain act of bankruptcy*; as keeping house, &c., though he afterwards goes abroad and is a great dealer, yet that will not purge the first act of bankruptcy. But *if the act is doubtful*, then going abroad and dealing will be an evidence to explain the intent of the first act; for if it was not done to defraud creditors and keep out of the way, it will not be an act of bankruptcy: also, if after a plain act of bankruptcy he pays off or compounds with his creditors, he is become a new man.

olkett Aff. of
Fitch v.
Freeman,
2 T. Rep. 59.

Therefore, where a trader was denied to a creditor who called in the morning with a bill for payment, though by the custom of the city he had till five o'clock in the evening to pay it, and in fact did pay it in the course of the day, yet it was resolved, That having committed an unequivocal act of bankruptcy by the denial, it could not be purged or explained away by any subsequent circumstances.

3. The next thing to be considered is,

The Debt of the Petitioning Creditor.

1. By stat. 5 Geo. 2. c. 30. it is enacted, "That no commission of bankruptcy shall be sued out upon the petition of one or more creditors, unless the single debt of the creditor, or of two or more persons being partners petitioning for the same, does amount to 100l. or upwards; or unless the debt of two creditors amount to 150l., or of three or more creditors to 200l., and the creditor or creditors petitioning for such commission shall, before the same shall be granted, make oath of the truth and reality of such debt."

Bickerdike v.
Bolman, B. R.
1 T. Rep. 405.

1. In this case the bankrupt was fairly indebted to the petitioning creditor in upwards of 100l., but before the commission sued out, he had given to the creditor a bill of exchange, which reduced the debt to within 100l.; but this bill of exchange was drawn on a person with whom the bankrupt had no dealing, and which was of course *not accepted*: the petitioning creditor kept the bill, and gave no notice to the bankrupt of the non-acceptance, and sued out the commission on the whole debt: in an action in which the bankruptcy came in question, it was insisted, that the petitioning creditor having neglected to give notice of the non-acceptance of the bill, *had by his laches made it his own*, and that therefore the petitioning creditor's debt being less than 100l. that the commission was irregular: the point being reserved, the Court was of opinion, That the bill being drawn on a person who had no effects of the drawer in his hands, that the notice of non-acceptance was unnecessary, as he never could sustain an injury for want of notice, and that so there could be no extinguishment of the amount of the bill of exchange; and that the petitioning creditor's debt was therefore sufficient.

Mann Aff. of
Stevens v.
Shepherd,
6 T. Rep. 79.

So where the bankrupt was indebted to the petitioning creditor in 100l. before his bankruptcy, but after an act of bankruptcy, and which fact was known to the creditor, he received of the bankrupt 50l. by which his debt was reduced to less than 100l., and he sued out the commission on the debt standing under those circumstances.

circumstances; it was held, notwithstanding, to be a good debt to support the commission, for payment of the 50l. being made to the petitioning creditor after he knew an act of bankruptcy had been committed was void, so that the creditor could not retain it, and the original debt therefore remained, which was sufficient to support the commission.

2. "Under this statute the petitioning creditor's debt must be a legal one."

For where the petitioning creditor's debt was *as assignee of a bond due by the bankrupt*, the commission was superseded; for he was only an equitable creditor.

Meddicott's case in Cane, 2 Stra. 899.

So where one *Alsworth* entered into an agreement to purchase from *Hylliard* an equity of redemption of an estate then in mortgage, for which he was to give 400l. and articles were signed accordingly. *Alsworth* paid 250l., and was to pay the other 150l. on the execution of the conveyances, but *Hylliard* refused to complete the purchase, upon which *Alsworth* sued out a commission of bankrupt on the debt of 250l. On a petition to supersede it, Lord *Hardwicke* doubted whether a commission could be taken out on such a contract; for the remedy should have been a bill for performance of the contract, and no action could in strictness of law be maintained. But it appearing that since the issuing of the commission, *Alsworth* had taken an assignment of the mortgage, which he could hold till satisfied, he ordered the commission to be superseded.

Ex parte Hylliard, 1 Atk. 147.

3. "The debt must be a legal and good debt, and for which an action can be maintained."

For where a judgment had in this case been recovered against a trader, he was surrendered by his bail, and then charged in execution; after which the plaintiffs in that action sued out a commission of bankrupt, grounded on the debt for which the judgment had been obtained: the commission was superseded, the body of the debtor being in law a satisfaction for the debt.

Barnaby's case, 1 Stra. 653.

So a man cannot be a bankrupt for a debt contracted during his infancy, though the act of bankruptcy was after he came of age.

Caf. K. B. 243. Swayne v. Walsinger, 2 Stra. 746.

"But a debt barred by the statute of limitations may be a good petitioning creditor's debt."

This is to be taken with this restriction, that such debt will be an insufficient one to support the commission, if the objection comes from the bankrupt himself, who on such ground may supersede the commission; but the objection that the debt was barred by the statute of limitation, will not lie in the mouth of a person sued by the assignees; for the debt is not extinguished by the limitation, and the bankrupt has acquiesced in it: neither will the Court presume a debt to be barred though six years have elapsed. And accordingly Lord *Mansfield* at *Nisi Prius*, ruled, That the statute of limitations does not prevent the creditor from taking out a commission of bankruptcy, but extends only to remedy by action mentioned in the statute, but does not extinguish the debt or take away any other remedy.

Quantock v. England, 2 Burr. 2628.

Fowler v. Brown, Sitt. March. 1777 Cooke B. L. 12.

So where the debt due to the petitioning creditor was by bond, which was not due at the time of suing out the commission,

Ex parte James, 1 P. W. 610.

mission, the debt was held to be a bad one to support the commission.

This case was prior to the statute 5 Geo. 2. c. 30. and 7 Geo. 1. c. 31. which now allows creditors to the bankrupt by bills, bonds, or promissory notes payable at a future day, to petition for, or join others in petitioning for, a commission of bankruptcy, and such debts are provable under a commission, allowing the rebate.

It was decided in two cases of *Cockaine v. Love, Co. Bank. Laws*, 18. § 23.) and *Herbert v. Brown, Peake, N. P. Cas.* 54. that where goods were sold on credit, and no security taken, that still the creditor might sue out a commission of bankrupt on such *debita in presenti solvenda in futuro*.

Parflow v.
Dearlove,
4 East, 438.

This was, however, overruled; and it was decided that the statutes apply to *written securities* only, and that where money was due on any other account, if not then payable, it was not provable under the commission, and of course could not constitute a good petitioning creditor's debt.

But now, by stat. 49 Geo. 3. c. 121. § 9. "All description of debts payable at a future day, though not due at the time of the bankruptcy, are provable under the commission."

But it should seem, that they would not be good petitioning creditor's debts.

Vid. Green's
Bank. Law. 80.
contra.
Toms v. Mitton,
2 Stra. 744.

4. "The debt must be a subsisting debt *at the time of the act of bankruptcy committed*."

For where in this case the petitioning creditor's debt was under a note drawn by the bankrupt after an act of bankruptcy committed, the commission was superseded, the debt being a bad one.

Anon.
2 Will. 135.
Ex parte Thomas,
1 Atk. 73.
Vid. Dinne v.
Evans,
6 T. Rep. 57.

But where the petitioning creditor's debt was a note of 200l. given by the bankrupt to A. B. before any act of bankruptcy, but *indorsed* by A. B. to the petitioning creditor after an act of bankruptcy committed, the debt was held to be sufficient to support the commission, the debt being due by the bankrupt when he became so.

Cooke B. L. 22.

The authority of this case was confirmed by a subsequent one of *Bingley v. Maddison*, and vid. also *Glaister v. Heaver*, 7 East, 498.

Ambrose v.
Clendon,
2 Stra. 1042.

So where the bankrupt was indebted to the petitioning creditor by simple contract, and after a secret act of bankruptcy committed, *gave him a bond for the money*, it was held, That the bond did not so destroy the simple contract debt, but that it was a good debt whereon to ground a commission.

5. "But the debt on which the commission is grounded, need not have been contracted during the time that the bankrupt carried on trade."

Butcher v. Easto,
Doug. 282.
1 Sid. 411.

For a debt contracted *before a man entered into trade*, will be a good one to support a commission.

And therefore that resolution, That a trader cannot be a bankrupt for a debt contracted after he has left off trade, though he afterwards becomes a trader again, seems not to be law, since by the case of *Butcher v. Easto*, it is indifferent at what time the debt has been contracted.

Sir R. Gotton
et al. v. Daintrey

But where a man has *quitted trade*, he shall not be liable to be made a bankrupt on account of his former trading, for after contracted

contracted debts; though for a debt contracted during the trading he may, and even though after quitting trade he sells his remaining stock.

Where the petitioning creditor was *the administrator of the obligee of a bond given by the bankrupt*, but the bond had been given in the year 1765, the act of bankruptcy in 1773, and *the letter of administration granted in 1775*; this being subsequent to the act of bankruptcy, it was contended. could not support the commission; but Lord Mansfield over-ruled the objection; for the intestate and administrator are *una eademque persona*: and so the debt was due to the petitioning creditor before the act of bankruptcy.

And therefore where a trader was indebted while in trade in 100l. and then quitted trade, and became indebted to the same creditor in another 100l. he afterwards paid 100l. to his creditor, without saying upon what account; *Holt, Ch. Just.* said, That it would be too rigorous not to allow this payment to be appropriated to the 100l. debt contracted while the debtor was in trade, so as to suffer him to be still liable to a commission of bankruptcy: but he gave no absolute opinion on it.

6. *In general*, the following have been allowed to be good petitioning creditors' debts, to support the commission:

1. *An arbitration bond*; for it is a debt at law, and binds the parties till set aside for corruption or partiality; and therefore may well support a commission.

2. The petitioning creditor's debt in this case amounted to 100l.; but it was in *notes of the bankrupt, bought in at ten shillings in the pound*; it was held to be a good debt to support the commission, though it had been otherwise in the case of a bond.

3. Where an order was made that a solicitor's bill should be referred to a Master to be taxed, and that *all proceedings at law should in the mean time be stayed*, and while the bill was under taxation the solicitor sued out a commission for the debt due by his bill; on a petition to supersede it, it was held to be not a sufficient reason to supersede the commission; for the order for taxation extended only to the bringing of actions at law, and the other ordinary proceedings.

4. A commission may issue against one partner for a debt due by the partnership. *Vid. Cooke B. L. 18, & cas. ibid. cit.*

But in a joint debt to two, as on a joint bond, one of the obligees only cannot sue out a commission of bankruptcy, for the debt ought to be a legal one, upon which the bankrupt, and here one only, could not sue, against the consent of his co-obligee.

5. *The executor of a bankrupt* cannot sue out a commission grounded on a debt due to his testator, unless the commission against his testator has been superseded; for all debts due by him belong to his assignees.

and Sir And.
Bateman,
1 Sid. 411.

Ray Aff. of
Lorkins v. Clerk,
G. Sitt. Hil.
1775. MSS.

Meggott v.
Mills.
1 Ld. Raym. 287.
12 Mod. 156.

Per Ld. Hard-
wicke,
1 Atk. 241.

Ex parte Lee,
1 P. W. 782.

Anon.
Mofely, 27.

Ex parte Crisp.
1 Atk. 134.
Buckland v.
Newlam,
1 Taunt. 477

Ex parte
Goodwin,
1 Atk. 109

The Commission.

4. *The Commission* is next to be proved, which is done by producing it under the great seal, and the petition to the Chancellor on which it was granted.

F 4

5. The

5. The next thing requisite to be proved in actions by the assignees of the bankrupt, is

The Assignment.

This is to be done by producing the deed itself, and proving the execution of it by the commissioners by the subscribing witnesses.

6. The last thing to be considered under this head, is

Property in the Bankrupt.

This includes every thing of which he is the visible or real owner; every thing of which he has the actual possession, or of which he has parted with or lost the possession after an act of bankruptcy committed, or in contemplation of it.

1. Of Things of which he has Possession, or is the Real or Visible Owner.

1. To prevent a trader from injuring others, by deriving a credit from an appearance of stock or property which is not his own, it is enacted, by stat. 21 Jac. 1. c. 19. § 11. "That if any person shall at the time of his becoming a bankrupt have in his possession, order, or disposition, by consent and permission of the true owner, any goods or chattels whereof he shall be the reputed owner, and take upon him the sole alteration or disposition as owner, that the commissioners shall have power to sell the same for the benefit of the creditors."

Under this statute it has been held,

"The statute mentions 'goods and chattels' as the species of property designated by the statute, whereof, if the bankrupt is the reputed owner, or has the order or disposition, it shall pass under his assignment."

Horn v. Barker
et al. 9 East, 215.

Therefore, where three persons carried on the business of distillers together, and one retired, to whom in fact the stills, vats, and utensils of trade belonged, and one of the former partners took in a new partner, and it was agreed, on the retiring of the first partner, that the business should be carried on by the new firm, and they were permitted to use the stills, vats, &c. paying for them a certain sum annually. They afterwards became bankrupts, and the whole plant was seized and sold under the commission. On action brought it was resolved, 1. That the stills, &c. which were fixed to the freehold did not pass to the assignees, for they were not *goods and chattels*. 2. That the vats and moveable utensils did pass, for having continued in the possession of one of the first partners, though he had taken in a new partner, it was a case of reputed ownership within the words of the act. But, 3d, Had there been any usage of trade, that even the moveable utensils were set out to the manufacturer or trader, that might make a difference, and even these not be subjected to the bankruptcy.

ruptcy under stat. 21 Jac. 1. c. 19. For the former description, therefore of implements of trade, those fixed to the freehold, the plaintiffs here had judgment.

It was, however, decided in this case, that the interest of printer and publisher of a newspaper in such paper was an interest and species of property which passed to the assignees: and therefore where such printer had sold his interest in the newspaper, and afterwards became bankrupt, he having continued to print and publish it up to his bankruptcy, that the assignees were entitled to it under the stat. of Jac. against the purchaser, who had suffered the printing and publishing to go on as before.

Norton et al.
v. Tripp,
1 Bol. & Pul.
N. R. 67.

2. That it extends to mortgages or conditional sales as well to absolute ones; so that where in this case a trader had mortgaged his goods, stock in trade, &c., and the mortgagee suffered him to remain in possession, this mortgage was adjudged to be within the statute, and void as against creditors; who recovered the goods and stock accordingly.

Ryall v. Rolle,
1 Atk. 165.
1 Will. 260.

3. That it extends to *choses in action*; as bonds, profits in S. C. trade, &c.

4. That though the mortgage is to a partner, who thereby is in possession, yet that the mortgage is void within the statute, if such partner allows the mortgagor to continue in possession, and appear still as a partner; for the opportunity of fraud is the same, and it is within the mischief of the statute.

S. C.

3. "But the statute does not extend to assignments of *ships or cargoes at sea*."

For where *Williams* and *Wilder* being partners, assigned to *Heathcote*, to whom they were indebted, two ships, together with the bills of lading, and policies of insurances on the goods on board; *Williams* and *Wilder* became bankrupts, and the assignees brought their bill against *Heathcote*, grounding themselves on the statute 21 Jac. no possession having been delivered: but Lord *Hardwicke* was of opinion, That the statute extended only to cases where the assignee could obtain possession of the goods assigned, but which he left in possession of the assignor, and so gave him a false credit; which case did not hold here, *the ships being then abroad on their voyage*.

Brown v.
Heathcote,
1 Atk. 160.

In such case of the assignment by mortgage of a ship, the delivery of the grand bill of sale is a complete transfer of the property in the ship; and such delivery is good within the statute.

Atkinson v.
Malling,
2 T. Rep. 492.

"But the creditor or purchaser should take possession of the ship as soon as possible; for the delivery of the grand bill of sale will not be sufficient, if there was an opportunity of taking actual possession, and neglected."

Cooke B. L. 380.

For where *Wm. Tappenden*, being indebted to the plaintiff in 1,400l. for securing the payment, mortgaged to him some leasehold estates, wharfs, and *three boys*; but he kept possession of the boys, and soon after became bankrupt: the assignees got possession of the boys: upon which the plaintiff filed his bill to compel the assignees to redeem the boys, or that they might be sold to pay his demands: Lord *Talbot* dismissed the bill as far as it respected the

Stephens v. Sole,
1 Vez. 352.
Hall v. Gurney,
Hil. 25 G. 3.
Cooke B. L.
383. S. P.

the

the hoys; the assignment being void under statute 21 of *Jac.* and ordered them to be sold for the benefit of the creditors.

Gordon v.
E. I. Company
7 East, 223.

And where an officer on board an India ship sold his privilege to another, who put goods on board it, but they were entered in the name of the officer, it being prohibited to officers to sell their privilege, and the officer became a bankrupt, it was held, that his assignees were entitled to the property so invested in his privilege, a property within the stat. of *Jac.*

4. "Neither does the statute extend to cases of goods sold by the bankrupt, of which he has only the temporary possession after the sale."

Ex parte Flyn
& Field in re
Matthews,
1 Atk. 185.

For where *Matthews* the bankrupt, having 500 barrels of tar, sold two-thirds of it to *Flyn* and *Field*, and it was agreed that *Matthews* should also send to them the other third on his own account, but that he should be at the expence of cartage, portage, and shipping, and that he should lodge all the tar in a warehouse of his own till an opportunity of shipping it offered, there being none at that time; the tar was accordingly lodged in *Matthews's* warehouse; *Flyn* and *Field* paid for their part; *Matthews* became a bankrupt, and the tar was taken possession of by his assignees; but Lord *Hardwicke* held this not to be a case within the statute; for the words of the statute are "goods left in the possession, order, and disposition of the bankrupts;" which these could not be said to be, being merely temporary, and for a particular purpose.

5. "So neither does the statute extend to cases in which the bankrupt has not the order and disposition of the goods claimed."

Collins Aff. of,
Kent v. Forbes,
3 T. Rep. 316.

Manton v.
Moore,
7 T. Rep. 67.

For where the commissioners of the victualling-office, having occasion to erect a stage at *Weevil* in *Hampshire*, for shipping barrels, and published an advertisement for carpenters to send in proposals; *Forbes* was disposed to take the contract, but being a general merchant, could not do it in his own name; he therefore agreed with *Kent* the bankrupt, who was a carpenter, that he should take the contract, for which he was to have one-fourth of the profits, and a guinea a week for superintending the work, and the rest was to belong to *Forbes*: the contract was accordingly so made, and the timber was bought by *Forbes*, and shipped in his name, and delivered into the king's yard as for *Kent's* use, and received as such by the king's officers; they swore that they should not have received it on account of any other person, nor that they would have permitted *Kent* himself to dispose of it in any other manner than for the work contracted for, except such parts as were unfit for the purpose, as they considered it as delivered for the purposes of the contract. Before the work was finished *Kent* became a bankrupt, and *Forbes* got possession of the timber; to recover which the action was brought. The Court were of opinion, That this was not such a possession in the bankrupt as should entitle the assignees under the stat. 21 *Jac.* for the timber was the property of the defendant, to whom no fraud was imputable; there was no sale to *Kent*, nor any general delivery so as to give him the absolute disposition of it; for the officers of the yard would

would not have permitted him to have sold it to any other, nor to have used it, except for the purposes of the contract: this therefore could not enable *Kent* to get credit on this property: they therefore gave judgment for the defendant.

6. "And it seems to be admitted as a general rule, That in all cases where the bankrupt has made any sale or mortgage of any part of his property, of which possession could not then be given, that where the person to whom such sale or mortgage has been made has an opportunity of taking possession of the property, and neglects to do it, that he shall lose that equitable lien that he is entitled to as against the property; but that where he uses every means to acquire the legal possession, that in that case he shall be entitled."

For where *Syeds* the bankrupt, having received advice from a correspondent in *America*, that a quantity of of *Braziletto* wood was about to be shipped on his account, he procured an insurance thereon, and then applied to the defendant *Pasley* to advance him a sum of money on the credit of the goods and the policy of insurance; *Pasley* agreed to lend the money, and the bankrupt, by a stamped instrument, bound himself to deliver to the defendant the *Braziletto* wood, and also to deposit in his hands the policy of insurance and letter of advice, and to indorse and hand over to him the bill of lading when it arrived. The policy and letter of advice were deposited with the defendant: the bill of lading was also indorsed over when it arrived, but it was after *Syeds* had committed an act of bankruptcy; this was on the 2d of *February*, and the commission issued the 10th; the ship arrived in *April*, and the defendant got possession of the goods, for which the plaintiffs now brought trover; Mr. Justice *Abbott* delivered the opinion of the Court, That as between a person who has an equitable lien, and a third person who purchases for a valuable consideration, and without notice, the equitable title, though prior, shall not overreach the title of the vendee; for the title of him who has a fair possession, and an equitable title, shall be preferred to that of a mere equitable title; but as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the thing, without discharging the money due; the party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors trusted to a personal credit, but he to the thing; the assignees must stand in the place of the bankrupt, and take the thing subject to all the equitable liens to which it would have been subject in the hands of the bankrupt himself. It might be great inconvenience to commerce if it were to be laid down as law, that a man could never take up money on the credit of goods consigned till they actually arrived in port: there seems to be no inconvenience on the other side, nor can it be any inlet to fraud, for no person can be taken in to lend money on the credit of the cargo after the party has parted with all the documents, and delivered them to him who has the first lien,

Lempriere v. 1
Pasley,
2 T. Rep. 482.
Faulkner v.
Casa. cit.
2 T. Rep. 491.
1 Brown. 125.

7. "The

7. "The statute extends as well to goods entrusted to the bankrupt by a third person, and of which by disposing of them he is the visible owner, as to cases where the bankrupt himself, being the original owner, remains in possession after having sold them; for the mischief is equal of creating a fictitious credit."

Mace v. Cadell,
Cowp 232.

For where in this case, *Mace* the plaintiff, kept a public-house, had a licence, and said she was married to one *Penrice*; she went to the excise-office, had his name entered in the books, with a note in the margin "*married*;" *Penrice* had the licence, and continued in possession of the house and goods from that time till he absconded, and so committed an act of bankruptcy: *Mace* the plaintiff, claimed the goods in question; first, under a bill of sale from *Penrice*; but afterwards as her own original property, and denied her being married to *Penrice*: the Court were of opinion, That this was a possession of goods in the bankrupt within the statute of *Jac.*, and the plaintiff was nonsuited.

Bryson v. Wylie,
Cocks B. L. 391.

So where *Bryson* being possessed of a dyer's plant, sold it to *Simpson* for 165l. 16s. 6d. *Simpson* gave *Bryson* two promissory notes in payment, dated 19th of *January* 1780; one for the sum of 82l. 13s. 6d. payable the 4th of *January* 1781; the other for the same sum, payable the 6th of *January* 1782: when the first note became due, *Simpson* was unable to pay it; and *Bryson* offered to take back the plant, and return the notes, and agreed to let him have the plant at the rate of 5l. *per ann.* for the term of three years: to this proposal *Simpson* agreed, and a deed was accordingly executed, by which it was agreed that *Bryson* should let the plant to *Simpson*; and that if he should make default in any of the quarterly payments, or in the performance of any of the covenants, that the term granted should cease, and *Simpson* should deliver up the plant to *Bryson*. There was a memorandum at the bottom of the deed, that *Bryson* had put *Simpson* in full possession of the plant, by delivering him to a winch in the name of the whole. On the 5th of *July* 1783, *Simpson* had a commission sued out against him; and the messenger took possession of the plant: The Court held clearly, That this was a possession in the bankrupt, within the statute of *Jac.*, and belonged to the assignees.

Lingham v.
Biggs,
1 Bos. & Pull. 82.

So where the furniture of a coffee-house had been taken in execution by the sheriff, who made out a bill of sale to the plaintiff in such execution, and the plaintiff without ever removing them, let them to the keeper of the coffee-house at a yearly rent for four years, who continued in possession until she became bankrupt; it was held that the assignees might seize them as property of which the bankrupt was reputed owner, under the 21 *Jac.* 1. c. 19. § 11.

"But in such case the bankrupt must appear as the owner; for if from the nature of his business the presumption of the goods being his property is excluded, they shall not be liable to his bankruptcy."

L'Apostrie v.
Le Plaistrier,
1 P. Wms. 183.

As in the case of *goldsmiths* and *factors*, who do not deal on their own stock, but that of others: as in this case, which was trover against

against the assignee of one *Levi*, to whom before his bankruptcy the plaintiff had entrusted a parcel of diamonds to sell; on a case made, the Court of King's Bench were of opinion, That the bankrupt having no more than a bare authority to sell for his use, that they were not liable to *Levi's* bankruptcy.

"So in the case of *factor's*, goods consigned to them merely for sale, are not liable to their bankruptcy."

For if a merchant consigns goods to a factor, and he becomes a bankrupt, the goods still remaining in his possession, they shall still be deemed the property of the merchant; and he may recover them in this action.

Godfrey v.
Furzo,
3 P. Wms. 185.

So if the factor had sold the goods consigned to him, and received the money, and died indebted in debts of an higher nature, if it could be proved that the money so received had been invested in other goods, these shall be deemed to belong to the merchant's estate, not to the factor; but if the money had remained in specie, it had belonged to the factor's estate, and gone to answer the debts of an higher nature; for the money has no mark to be followed by.

Whitcomb v.
Jacob,
1 Salk. 160.

But where the factor had for the merchant's goods taken notes, instead of money, the Court of Common Pleas held, That the merchant should have the notes, as they could be traced.

Per Ld. Hard-
wicke,
1 Atk. 234.

And so if a factor had sold the goods consigned to him, and become a bankrupt, the merchant must come in as a creditor under the commission; though if he had laid out the money in other goods for the merchant, the merchant shall have them: so if the factor had sold for payment at a future day, the merchant shall have the money.

Scott v. Salmon,
Hil. 10 G. 2.
C. B.
Bull. N. P. 43.

As where the plaintiff, living in *Ireland*, employed *B.* in *London* to sell goods for him: *B.* sold them to *J. S.*; the plaintiff at the time was ignorant to whom they were sold; and *J. S.* was ignorant whose property they were; *B.* became a bankrupt, and *J. S.* paid the money to the defendants, his assignees: the plaintiff brought an action for the money against the assignees, and recovered; for though it was agreed, that a payment by *J. S.* to *B.* was a discharge for him against the plaintiff his principal, yet the debt was not in law to him, but to plaintiff whose goods were sold; and therefore was not assigned to the defendants under the general assignment of all their debts, but remained due to *A.* as it was before; so that being paid to the defendants who had no right to it, it was a payment under a mistake, and so was recoverable from them.

Garret v. Cul-
lum, E. 1708.
Bull. N. P. 42.
last edit.

And where the factor had a *del credere* commission, the same point was decided by the chancellor.

Ex parte Mur-
ray, Cooke B. L.
415.

"And the case is the same of goods which the bankrupt has in his possession, as executor or administrator, for the statute does not extend to these."

For where one *Marsh* died possessed of about 2000l. and some plate, leaving a widow and children, the widow married a man who became a bankrupt: the question was, Whether the assignees of the second husband were entitled to the plate which had been left in the possession of the bankrupt? Lord Hardwicke said, That it certainly was not in the statute; because the admi-

Ex parte Marsh
1 Atk. 158.

nistratrix

nistratrix had them in *auter droit*, and the husband could have them in no better right, and therefore they could not belong to his estate.

Viner Admin-
istratrix v.
Cadell,
3 Esp. N. P. Cas.
38.

So where the wife of a bankrupt had administered to her father, and become possessed as administratrix of his effects, to which she and infant brothers and sisters were entitled, and the husband had continued the business of the father for their benefit, held that that was not such a possession of the goods as shall be deemed an ordering and disposition within the statute 21 Jac.

7. "So that the criterion of what possession shall subject the goods of others in a trader's possession to his bankruptcy, is the exertion of any act of ownership unconnected with any circumstances of doubtful property, or the appearing to have such power and right."

Walker v.
Burnell,
Doug. 303.

Therefore, where a bankrupt was left in possession of his house and goods by his assignees, after obtaining his certificate, for the purpose of collecting his debts, and during that time traded for himself, it was adjudged, That this was not such a possession as should subject them to be taken by the assignees under a second commission.

Jarman v.
Wollotton,
3 T. Rep. 618.

So where in trover by the plaintiff as trustee for the wife of the bankrupt, the case was, That on the inter-marriage of the wife, by deed made previous to her marriage, all the wife's stock in trade as a milliner, book-debts, and other effects of the wife, were assigned to the plaintiff in trust for her separate use; there was no schedule, but an inventory of the furniture; at that time, and for some time after the marriage, she carried on business at a house apart from her husband, in *Welbeck-street*, but some time after, she removed to his house in *Marybone-street*, where he was a linen-draper; and carried on her business in a separate apartment: it appeared that the husband paid the rent of the house and had been at the expence of fitting up the shop, but there was contradictory evidence as to the manner of the wife's carrying on her business, whether for her own separate use or not. The jury found that it was not carried on separately, and found a verdict for the defendant for the stock in trade; but for the plaintiff for the furniture: it was moved, to set aside the verdict as to the furniture, as being a possession under stat. of Jac.; but the Court refused it, they being of opinion, That there was not such an order and disposition by the consent of the true owner, as was within the statute; that the trustee was the legal owner, and he gave no consent for such purpose; and the wife's possession, in the manner proved at the trial, was no evidence of fraud, for she was the agent of the trustee: an objection was made on the part of the defendant, that there was no schedule when the deed was made; but the Court held, That there was nothing in the objection.

"And by no agreement between the parties shall the effect of the statute be defeated, for notwithstanding such, if the bankrupt has the power of disposition of the property, it shall belong to the assignees."

Therefore

Therefore where timber was sold to a trader, with a proviso that in case of bankruptcy the vendor might retake it, such a condition was adjudged to be void under 21 Jac. 1. c. 18. § 11. if the bankrupt had the disposition of it: and that it belonged to the assignees. *Holroyd et al. v. Lee*, 176.

2. These are cases in which the bankrupt is in possession of goods at the time he becomes a bankrupt, and which are recoverable under the circumstances now mentioned; but goods of which he has not the possession, if they have got into the hands of others after an act of bankruptcy committed, are in like manner recoverable in this action. 1. For the assignment of the bankrupt's property has a relation to the act of bankruptcy, and the assignees stand in the bankrupt's place from that time; that is, the property is in them from that time, and they may maintain trover for all goods of the bankrupt of which others have obtained possession from that period.

Monk v. Morris,
1 Vent. 192.

"And it makes no difference whether the property *was in* England or elsewhere, for it all belongs to the assignees, and is by them recoverable."

For where the defendants were considerable creditors of the bankrupt, and resided in *England* at the time of the bankruptcy; upon the issuing of the commission, *they knowing of its issuing* sent out an order to their attorneys in *Rhode Island* in *America*, to attach property of the bankrupt's there; the attachments were made there, and the proceeds, amounting to 496l., remitted to the defendants in *England*; to recover which the action was brought: it was resolved, That by the bankruptcy the whole property of the bankrupt vested in the assignees, and that therefore it could not be attached by any creditor in *England*; and that whatever he received under such attachment, he was liable to be called upon to refund to the assignees.

Hunter v. Potts,
4 T. Rep. 182.
Phillips v. Hunter,
2 H. Black. 402.
S. P.

But the person abroad who has so had the bankrupt's property recovered from him, is not, on his coming to *England*, liable to the assignees; for having parted with it under the coercion of a court of competent jurisdiction, that shall justify him in law.

Le Chevalier v. Lynch,
Doug. 170.

2. "Where the assignment of the goods is itself an act of bankruptcy, and so the goods assigned are recoverable in this action, has already been mentioned; where an act of bankruptcy has been committed, and any person obtains possession of them afterwards by any means, they are in like manner recoverable."

As where the bankrupt had been arrested on the 2d of *May*, and on the 4th was charged in execution: on the 17th of *June* a *fieri facias* issued against him to the defendant the sheriff, who on the 26th levied the money: on the 5th of *July* the commission was taken out on the act of bankruptcy of lying in gaol two months, after which the sheriff returned *nulla bona*, and the return was adjudged to be good; for by the relation the property was in the assignees from the 2d of *May*.

Coppendale v. Bridgen,
2 Burr. 814.

So where the defendants, who were sheriffs of *London*, had seized the goods of the bankrupt, after an act of bankruptcy committed, but before a commission had been sued out; but be-

Cooper v. Chisty and Blackiston,
1 Burr. 20.
1 Black Rep.
65. S. C.

fore a sale, a commission had been sued out, and an assignment made, notwithstanding which the defendants sold them; they were held to be liable to trover.

Ruth v. Baker,
2 Stra. 996.

Or the action may be maintained against the plaintiff who sued out the execution as well as against the sheriff, if he can be proved a party to the conversion by giving bond to secure the sheriff, and so making the act his own.

But to this there are two exceptions:

Audley v.
Halley,
Cro. Car. 148.

1. Where an *extent* issued on a statute, and the conusor became bankrupt after the execution of the extent, but *before the liberate*; in trover by the assignees against the defendant, who had got possession under the liberate, the Court held, That the property was divested out of the bankrupt by the extent, and that the goods were therefore not assignable. *Note*, The extent was of the 21st of October, the act of bankruptcy was on the 3d of November, the liberate was sued out on the 6th, and the commission issued the 8th of the same month.

1 Atk. 262.

2. The second exception is in the *case of the crown*, for the king is not bound by any of the statutes of bankruptcy, he not being named in them; so that he is not affected by the relation, but only by the *actual assignment*, which changes the property.

Brassey v.
Dawson,
2 Stra. 978.

As where the bankrupt was *indebted to the king as collector of the land-tax* for the precinct of *Aldgate*, and the commissioners of the land-tax issued their warrant and *seized his effects after an act of bankruptcy committed*; but the goods were not taken away till after the assignment under the commission; it was held, That the goods being in the hands of the crown from the time of the seizure, were not affected by the act of bankruptcy which preceded it.

Rex v. Crump
& Hanbury,
Parker's Rep.
126.

So where one *Edward Lewis* was indebted to the king by bond, dated the 3d of *March*, 19 Car. 2., an extent issued upon that bond tested the *same day with the date of the assignment under a commission of bankruptcy against Lewis*; when it was held, That the extent should be preferred.

Stracy v. Hulfe,
Doug. 395.
Rex v. Fowler,
& Attorney
General v.
Senior.
ibid. S. P.

And where it is enacted by stat. 8 Ann. c. 19. "That all *candles*, and all the materials for making them, should be *subject to the debts and duties to the crown*, and all *penalties and forfeitures for the same*;" it was adjudged, That where a candlemaker was in debt for the single duties, and became a bankrupt, and *after the assignment* was convicted in the double duties, that this was a lien on the candles, utensils, &c. in the hands of the assignees, and might be taken from them under the statute, *notwithstanding the assignment*; for the assignees are the representatives of the bankrupt, and they are liable to every equity that would affect him.

Rex v. Mann,
2 Stra. 729.

Therefore where an extent issues, it shall always be *tested of the true day it issues*, and shall not be *antedated* so as to over-reach any mesne assignments.

How far the crown is entitled to a preference by extent against a subject, depends upon stat. 33 H. 8. c. 39. by which it is enacted,

"That

that if any suit be commenced or taken, or process awarded for the king, that the king's suit shall be preferred, and that he shall have the first execution against any person for his debts, *always the king's suit be taken and commenced, or process awarded for the said debt at the suit of the king, before the judgment given for the said other person.*"

Under this statute it has been held,

That if execution upon a judgment issues against the goods of the king's debtor, under which the goods are taken, and afterwards an extent issues that those goods cannot be taken under the extent."

In this case, where the plaintiff, in *Easter* term 17 Geo. 3., recovered a judgment in the *King's Bench* against one *Thomas Sumner*, and on the 16th of *April* sued out a *fi. fa.*, a warrant of 2 Bl. Rep. 1251. Rorke v. Dayrell, 4 T. Rep. 402. S. P. which was on the 18th delivered to an officer of the sheriff of *London*, who on the same day took the goods in execution: on the 19th of *April* an extent issued, and was delivered to the sheriff before the plaintiff's execution, and the sheriff returned *nulla erant bona* on the plaintiff's writ: on an action being brought for the return, the Court held, That by taking the goods under the sheriff's execution, that they were bound, and the extent could prevail.

How far in the case of partners the acts of one shall be aided by the bankruptcy of the other in the disposal of the joint effects, *vid. Fox v. Hanbury, post.*

OF TROVER, WITH REFERENCE TO THE PERSON.

Under this head I shall consider, 1st, by whom this action is maintained: 2d, Against whom it lies.

2. BY WHOM TROVER MAY BE MAINTAINED.

"Possession alone gives a sufficient title to maintain this action against all persons, except against the owner."

where a person finds any thing, this gives him such a property as enable him to maintain this action against any person who takes it from him, except the rightful owner, *Armorie v. Delamirie, 1 Stra. 505.*

where Sir *Thomas Palmer*, seized of a wood, sold 600 cord of timber of it to one *Cornford* and his assigns, to be taken by the order of Sir *Thomas Palmer*; and *Cornford* assigned his right to the plaintiff: Sir *Thomas* afterward sold 4000 cord of timber of the wood to the defendant, to be taken at the defendant's election; the third of wood was marked out by Sir *Thomas* to the plaintiff, and it, and the defendant took it away; on which the plaintiff brought trover and recovered, for though the defendant had a right to 4000 cord of wood to be taken in any part of the wood, the plaintiff having cut, and got possession of the wood, had a good and sufficient title, *Baffet v. Maynard, Cro. Eliz. 810. 5 Co. 24. b. S. C.*

where the plaintiff, claiming a right of common, had cut a great deal of rushes which grew thereon, and the defendant denied the plaintiff's right, had taken and carried them away; the plaintiff recovered in trover for them; for though the right of common was not proved, yet the plaintiff was entitled to the value of the rushes, *Rackham v. Jessup et al. 3 Will. 332.*

common might be doubtful, yet having by possession obtained a special property in them, he could well maintain an action against a stranger.

"But *actual* possession is *not necessary* to maintain this action."

Lord Cullen's
case,
Mich. 14 G. 2.
Bull. N. P. 33.

For where in ejectment for a mine, it was offered in evidence in proof of possession, that the lessor of the plaintiff had had a verdict in trover for a parcel of lead dug out of the mine, it was held not to be sufficient proof of possession, as trover might be maintained without possession.

"For a *right of possession* is sufficient."

Flewelling v.
Rave,
1 Bulst. 68.

As where *A.* being indebted to the plaintiff, and the defendant to *A.*, and it was agreed between them that the defendant should deliver goods to the plaintiff in satisfaction of *A.*'s debt, the defendant did not do so, but converted them to his own use; it was held, that the plaintiff might maintain trover, *though he never had had possession of the goods.*

"The possession here spoken of is a right of *present* possession."

"for if the right of possession is to be preceded by any thing to be done, the action of trover will not lie."

"be done, the action of trover will not lie."

Harrison et al.
Aff. of Wallace
et al. v. Mayor,
6 East, 614.

In trover for a quantity of starch sold by the defendant to the bankrupt, and then lying at the bull-porter's warehouse, the defendant gave an order on the bull-porter in these words:—"Please to weigh and deliver to Messrs. *Wallace* and *Hawes* all my starch;" under this order, part was delivered and part remained undelivered, when *Wallace* and *Hawes* became bankrupts, and then the defendant refused to deliver the remainder, trover was brought by the assignees; it was adjudged, That no property vested in the vendees until the starch was weighed, that was necessary to give a title to the quantity, and which not having been done, for want of any complete right of property vesting in the plaintiff, the action could not be supported.

"But if a party has neither the actual possession, nor right of actual possession, trover will not lie."

Gordon v.
Harpur,
7 T. Rep. 9.

For where the plaintiff, who was the landlord of an house, which with the furniture he had bought of the former proprietor, a Mr. *Borrett*, and had let it ready furnished to a Mr. *Biscoe*; the furniture was taken in execution by the defendant, who was sheriff of *Kent*, on a judgment against *Borrett* the former owner, from whom the plaintiff had purchased: it was adjudged, That as the plaintiff had let the furniture for a time, which was then unexpired, so that he had not then a right of possession, that he could not then maintain the action.

2. "But to support this action, *property*, either actual or special, in the plaintiff is essentially necessary."

Colston v.
Woolton,
Trin. 3 Ann.
Per Holt, at
G. Hall,
Bull. N. P. 35.

For where the plaintiff had ordered a tradesman to send goods by an hoyman, and the tradesman sent the goods by a porter to the house where the hoyman resided when in town; but he not being there, the porter left the goods with the landlord of the house, and the goods were lost; it was held, That the plaintiff could not have trover for the goods; for the property never vested in him for want of delivery, but still remained in the tradesman: though it had been otherwise, had the delivery been to the servant of the hoyman or one employed by him to receive goods; for a delivery to them

them would have vested the property in the plaintiff. *Ante*, fol. 14.

So where the plaintiff had exchanged an horse with the defendant, and given possession of it, it was held, That though the exchange might have been unfair in the warranty, yet that trover would not lie for it, for *the property was gone out of the plaintiff by the exchange.* Power v. Wells, Cowp. 819. 2 Ref.

So where goods were condemned in the Exchequer, and proclaimed as forfeited, it was adjudged, That *the property was thereby* ^{altered}, that neither trespass nor trover would lie against the person who had seized them. Ekins v. Smith, Sir Th. Raymond, 336.

"And a parol gift of goods, without some act of delivery, will not transfer a property."

For where the plaintiff's intestate lodged at the defendant's house, and had furniture and plate there, and was proved to have said, that whatever he brought into those lodgings he would never take away, but give to the defendant's wife: and now upon trover for these things, it was ruled at *Nisi Prius* by the Chief Justice, That a parol gift without some act of delivery, would not ^{transfer} the property, and that such an act was necessary to establish a *donatio mortis causa*. It then became a question, if there had been any delivery? and to prove one, the defendant shewed, that the intestate when he left town, used to leave the key of his rooms with the defendant; and this was ruled to be sufficient, and the defendant had a verdict. Smith v. Smith, 2 Stra. 955.

1. "But an *absolute property* is not necessary, as a person having a *special property* may maintain the action."

As where the goods are seized by the sheriff under a *fi. fa.* the sheriff may maintain this action against any person for taking and converting them to his own use. Wilbraham v. Snow, 1 Lev. 282.

So a carrier may maintain trover for goods entrusted to him to carry, which have been taken out of his possession. 1 Mod. 31.

So if an house let for years be blown down, the lessee may have trover for the timber, though *the property be in the reversioner.* Per Powell, Middl. Circ. Bull. N. P. 33.

So the lord of a manor who seizes an *estrays or wreck*, may, before the year and day expired, have trover for it against a stranger, for he has a possession that may become a property. Sir Wm. Courtney's case, Salk. MSS. Buller N. P. 33.

So an uncertificated bankrupt has a right to goods acquired by him since his bankruptcy against all the world but his assignees; and may maintain trover against a stranger. Webb v. Fox, 7 T. Rep. 391.

So where an order for delivery of goods has been given to an uncertificated bankrupt, a payment of a debt acquired subsequent to his bankruptcy, he may maintain trover. Fowler v. Dunn, 1 Bos. & Pull. 44.

3. It was formerly the opinion, That *executors* could not maintain this action (*Savill*, 133); but it is now settled that they may have this action for a conversion of goods in the lifetime of their testators, by the equity of stat. 4 Ed. 3. as well as for a conversion in their own times. Elizabeth Countess of Rutland, v. Isabel Countess of Rutland, Cro. Eliz. 377.

Under this head it has been resolved,

1. That if the wife is executrix, the husband may join in the action; for the possession of the wife, as executrix, is the possession Tremling v. Clutterbuck, Style, 48.

session of the husband, and the damages recovered may concern them both.

Lord Hastings
v. Sir Archibald
Douglas,
Cro. Car. 343.
2 Vern. 246.

2. If the husband devotes away jewels, or such things as are *paraphernalia* to the wife, she cannot hold them; but they are recoverable by the husband's executor from her. But if the husband dies *intestate*, or by will does not dispose of the jewels, &c. she shall have them.

Long v. Hebb,
per Rolle,
Ch. Just.
Style, 341.

4. An administrator may maintain this action for the taking of the goods of the intestate by one before the letters of administration granted; for the letters of administration relate to the death of the intestate.

2 Stra. 60.

So he may for a taking in the lifetime of the testator.

Under this head it has been decided,

1. That an executor *de son tort* is liable to this action at the suit of the administrator.

Anon.
1 Vent. 349.

And though in such action it appeared that the goods for which the action was brought had been taken in execution, upon a judgment obtained against the defendant as executor *de son tort* by a creditor of the intestate, yet it was held to be no discharge; for men should be discouraged from meddling with intestate estates: though this had been a good discharge against another creditor who sued him in the same right.

Montford v.
Gibson,
4 East, 442.

So a delivery of goods which belonged to the testator to a creditor in satisfaction of his debt, by the testator's widow after her husband's death, was adjudged to be bad, she having no lawful authority: though attempted to be supported, on the ground that she had thereby made herself executor *de son tort*, and so had a right, by delivery of them *bonâ fide* to give a property to the creditor.

Wilson v.
Packman,
Moor, 396.
Cro. Eliz. 459.
S. C.

2. If an administration has been granted to any person, and the administration is afterwards repealed, and administration granted to another, the first administrator shall not be liable in this action for the goods which he disposed of; but all dispositions by him made shall be valid.

Whitehall
v. Squire,
1 Salk. 295.
3 Mod. 276.
S. C.

3. It was held by two justices in this case against *Holt*, That where a person, before administration granted to him, permitted a person to take the goods of the intestate, that this assent should bar him in an action of trover for these goods brought after administration granted.

Blackburn et ux.
v. Graves,
2 Lev. 107.
2 Vent. 260.

5. *Baron and feme* may join in this action for goods which were the property of the wife before marriage, and which goods came to the hands of the defendant before marriage, though they have been converted after; for though the conversion is the ground of the action, and therefore the husband may sue alone, yet the inception of the cause of action was in the wife, by the trover before marriage.

2. AGAINST WHOM THIS ACTION MAY BE MAINTAINED.

1. "The owner of goods may maintain trover for them against any person into whose hands they may have fallen, though the person in whose possession they are found may have honestly obtained it, provided it was not by sale in market overt, or by other fair transfer."

As where the plaintiff left jewels sealed up with his banker for safe custody only, and the banker broke open the seal and pawned the jewels to the defendant, the plaintiff brought trover for them; when it was adjudged, 1st, That the banker being a mere bailee for safe custody, had no authority to open the bag; and by so doing was a trespasser: 2d. That the defendant could obtain no property in the jewels, except by a sale in *market overt*: 3d, That pawning was no sale in *market overt*, and therefore that the property still remained in the owner; (the plaintiff,) who might well maintain this action to recover them.

Hartop v. Hoare,
1 Will. 8.
2 Stra. 1187.
S. C.

So where the plaintiff gave lottery-tickets to a goldsmith to receive the money for him, and the goldsmith having before given to the defendant a note to deliver to him so many lottery-tickets, delivered to him the tickets he had received from the plaintiff; it was adjudged, That this was not such a transfer as changed the property, but that the plaintiff might maintain trover for them.

Ford v. Hopkins,
Salk. 283.

So where in trover for a horse, it appeared that he had been stolen from the plaintiff by one P., who had sold him to the defendant, under the name of Lyfter, in *market overt*, and the assumed name of Lyfter was entered in the toll-book; it was adjudged by the Court, That this being by a false name, was not such a sale as should alter the property.

Gibbs's case,
1 Leon. 158.

"But where there has been a fair and regular transfer of the thing in question, this action will not lie."

As where a bank-bill, payable to A. or bearer, was lost by A. and found by a stranger, who transferred it to the defendant; it was held, That though A. might have trover against the stranger, yet that it would not lie against the defendant, who by the fair course of trade had obtained a property in it. Vide *Miller v. Race*, ante, Chap. of Assumpsit.

Anon.
1 Salk. 126.

2. "When the taking of the goods has been tortious, proof of an actual conversion to the party's own use is not necessary to maintain this action."

As in the case of goods seized by custom-house officers which are not liable to duties, as the wearing apparel and necessaries of passengers on board ships; for these trover will lie against the custom-house officers who may have seized them, though the goods are lodged in his majesty's stores, and so are not converted to the use of the defendant the officer.

Tinkler v. Poole,
3 Will. 146.
5 Burr. 2657.
S. C.
Chapman v. Lamb,
2 Stra. 943.
Shipwick v. Blanchard,
6 T. Rep. 298.

So where the plaintiff's goods were taken as a distress by the defendant, claiming as assignee of the plaintiff's landlord, under a bankruptcy, but which commission could not be supported, and the plaintiff paid a sum of money to have the goods restored; it was adjudged, 1st, That though the taking them was as a distress and in the character of assignee, not tortiously for the party's own use, that it was a sufficient taking to support the action; and 2dly, That the receiving money from the plaintiff in order to have them returned, was a sufficient conversion.

"So trover will lie against a servant for goods which he has wrongfully obtained, though they have been converted to the use of the master."

For where *Hughes*, the bankrupt, was possessed of the goods for which the action was brought on the 22d of September, on

Perkins, AC
of Hughes,
v. Smith,
1 Will. 32.

which

which day he became a bankrupt: on the 23d of September the defendant *Smith*, who was servant and rider to Mr. *Garraway*, to whom the bankrupt was considerably indebted, went to the shop to get the money, which was shut up; but the bankrupt delivered to him the goods in question, and he gave a receipt for them in his master's name and sold them for his own use: it was objected, That the action would not lie, the conversion being to the *master's use*: but *per Cur.* The point is, Whether the defendant is not a wrong-doer? if he is, no authority he could derive from his master could excuse him. The bankrupt had no right to deliver the goods to *Smith*, nor *Smith* to dispose of them; and the gift of the action of trover is the disposal and conversion of the goods of another wrongfully.

“ But where *the taking has not been tortious*, there must be some “ evidence of a *conversion*.”

*Ross v. Johnson
and Dawson,
5 Burr. 2825.*

As where trover was brought against the defendants as wharfingers, to whom certain goods of the plaintiff had been delivered, and which they had not delivered to the owner. The goods were lost or stolen out of the defendant's possession. The plaintiff, before the commencement of the action, demanded the goods and tendered the wharfage; the goods not being delivered, he brought this action for them, when it was held, That for goods stolen or lost out of the wharfinger's possession, this action would not lie; for to maintain trover, an injurious conversion ought to be proved, and that a bare non-delivery was not sufficient, as this might have been a mere omission, for which the remedy should be an action on the case, not trover, which supposes an actual wrong.

*Youll v.
Harbottle,
Peake Cas. N. P.
49.
Anon.
Saik. 655.*

But where a carrier was intrusted with goods to carry, and by mistake delivered them to a wrong person, it was ruled by Lord *Kenyon*, that trover was maintainable against him.

Aliter if the carrier had lost the goods by negligence.

“ But if one man is entrusted with the goods of another, and “ puts them into the possession of a third person, contrary to orders, it “ is a conversion; and trover may be maintained for them.”

*Syed v. Hay,
4 T. Rep. 260.*

As where the plaintiff was owner of goods on board the defendant's vessel, then lying in the *Thames*, and he directed the defendant not to land the goods at the wharf at which the vessel lay: the defendant promised not to do so, but afterward, apprehending that the wharfinger had a lien for his fees on the goods, because the vessel was unloaded at the wharf, he delivered the goods to the wharfinger, who was ready to deliver them on payment of the fees. It was objected, that the action should be *case* for the misdelivery, and that trover would not lie, as the plaintiff's right to the goods was not denied; but it was adjudged, That though the right was so admitted, that a charge was brought on the plaintiff for the fees; and the goods being delivered against the owners orders, and no right being shewn to the wharfage as set up, that it was a conversion, and the action maintainable.

“ It is not necessary to support this action that the owner should “ be absolutely deprived of his goods by the conversion of him who “ has had possession of them; for damages are recoverable in this “ action for any partial conversion or user of the goods of another “ by the owner, after he has recovered possession of them.”

As

As where a carrier took part of the liquor out of a vessel which he was employed to carry, and filled it up with water; it was adjudged to be a conversion of the whole, and the plaintiff recovered accordingly.

Richardson v. Arkinton,
1 Stra. 576.

So if a man takes my horse, and rides him, and afterwards delivers him to me, yet I may maintain trover against him; for the riding is a conversion, and the redelivery will only go in mitigation of damages.

Per Popham,
Goldsb. 155.
1 Darc. 21.

4. "Wherever the law has given a *lien* upon any goods or other things of value, there the retaining of them shall not subject the person to an action of trover."

1. This doctrine in favour of liens, the courts of late years have much leaned to, for the convenience of trade; allowing it, first, Where there is an *express contract to that effect*; and secondly, Where it is *implied*, either from the *usage of the trade* or the *manner of dealing between the parties*.

Per Lord Mansfield,
4 Burr. 2221.

It must be however observed, that to give a lien on goods, they must have come legitimately to the hands of the person who claims the lien, for if he has got possession by misrepresentation or fraud, he cannot claim that lien which he might otherwise have.

Madden v. Kempster,
1 Campb. 12.

As, 1. A *factor* has a lien upon goods consigned to him, not merely for what is due for those goods, but for the *balance of a general account*, and for which he may retain them. So he has a lien on the money in the hands of the buyer.

Krutzer v. Wilcox,
2 Burr. 936.
Drinkwater v. Goodwin,
Cowp. 251.
Hammond v. Barclay,
2 East, 227.

And so in this case, where the principal gave notice to his factor, of his intention to consign a ship to him for sale, and in consequence drew bills on him, which he accepted, and the principal died, and the executors directed the captain to follow his former orders, who thereupon delivered the ship to the factor, who sold her; it was adjudged, that the factor had a lien for all advances made on account of the ship and on the bills accepted though not paid.

"But a factor has no lien on goods, unless they come into his actual possession.

For where a factor had accepted bills drawn on him on the faith of intended consignments to be made to him, but before the consignment arrived, the factor had stopped payment, and become a bankrupt; it was determined, That there being no actual delivery of the goods before the bankruptcy, that there was no lien, and that the consignor might stop them *in transitu*.

Kinlock v. Craig,
3 T. Rep. 783.

And though, in this case, goods had been consigned to a factor by a trader, and the factor knew the trader was in insolvent circumstances, but he, nevertheless, advanced him money on the credit of the goods; it was adjudged, That he was entitled to a lien against them for the money he had advanced, and should hold them against the assignees of the consignor.

Foxcraft v. Devonshire,
2 Burr. 922.
1 Bl. Rep. 193.

But where the principal had committed a *secret act of bankruptcy*, when he consigned the goods to his factor, who had accepted bills on the faith of the consignments, it was nevertheless held, that the proceeds should belong to the assignees of the consignor.

Copeland v. Stein,
8 T. Rep. 199.

And so bankers have a lien on bills or notes paid into their houses for the balance of a general account.

Jourdain et al. Aff. of Lefevre, v. Nowlan,
Esp. Caf. N. P.

With 66.

Giles v. Perkins,
Aff. of Dickinson,
9 East, 12.

With respect to the mode by which bankers become entitled to bills of exchange paid into their hands, there is this distinction to be observed: Every man who pays bills not then due into his banker's, places them there as in the hands of his agent, to obtain payment. If the banker discounts the bill, or advances money on it, he acquires the entire property in it, or has a lien on it *pro tanto* for his advance: there is a difference between London and Country bankers in some respects. The London banker, if overdrawn, has a lien on the bill, though not indorsed: but the Country banker who takes the bill indorsed, if his account is overdrawn, has not only a lien on the bill, but may sue as indorser: but neither have any lien upon the bill, unless the account is overdrawn, (*per Lord Ellenborough, 9 East, 14.*); and therefore, where bills were so paid into a Country banker's, though credited to the customer as cash, yet the balance being in *Giles v. Perkins*, in favour of the customer, he recovered them of the banker's assignees.

Naylor v.
Mangles,
Espin. Caf. N. P.
109.
Savill v.
Barchard,
4 Esp. N. P. Caf.
53.

Ex parte
Ockenden,
1 Atk. 235.

So has a wharfinger on goods brought to his wharf.

So were dyers in this case held to have a lien, for a general balance. *Vid. infra, Green v. Farmer.*

2. "In the case of *manufacturers*, the lien which they have against the goods entrusted to them to manufacture, is not a general one, but confined to the *work done to the goods themselves*, "unless the express usage of the trade is proved to the contrary."

As where the bankrupt was a flour-factor, and had employed the petitioner, who was a miller; and he having always a large quantity of corn in his hands, and a great number of sacks, had, relying on these as a security, trusted the bankrupt very largely; and when he became bankrupt, he owed to the petitioner 286l. for grinding done before, and 16l. for grinding corn then in hand, which corn and sacks the petitioner insisted upon holding for his debt. But Lord *Hardwicke* held, That as the petitioner had shewn no general custom for a lien, that it only depended on the bailment proceeding from a delivery of goods for a particular purpose, *which could not be extended beyond the work done to the goods themselves.*

Green v.
Farmer,
4 Burr. 2214.

So that a manufacturer who takes in goods for a particular purpose (as to dye them) has a lien on them *for the work done to the goods themselves*; but cannot retain them *for any other demand against the owners of the goods*, was held by the Court of King's Bench in this case,

Kirkman et al.
Aff. of Walker
v. Shaw,
6 T. Rep. 14.

Yet, where the dyers in the neighbourhood of *Manchester* published resolutions, agreed upon amongst themselves at a public meeting, That they would not receive any more goods to be dyed, but on condition that they respectively should have a lien on those goods for their general balance; the Court of King's Bench held this to be good in law, and that any one, who after notice of it delivers goods to any of those dyers, must be taken to have assented to those terms, and consequently cannot demand goods delivered without paying the balance of his general account.

Quære ergo as to the case *supra*.

"But the usage of trade will create a general lien."

As where it was proved to be the usage for *packers* to lend money to clothiers, and the clothes left to be packed were considered as a *pledge*, not only for the packing, but for the *loan of the money likewise*; and here the bankrupt, who was a clothier, having borrowed money on a note of hand from the petitioner, who was a packer, but at a time when he had no dealings with him, and the bankrupt having afterwards sent him cloth to pack, it was held, That he might retain the cloth for the debt, as well as for the price of packing.

But where by the usage of trade a manufacturer had a lien, if he parts with the goods, he cannot stop them *in transitu* afterwards.

Therefore where the bankrupt living in London, sent goods to the defendant, who was a fuller in Exeter; upon which the latter, by the custom, had a lien, and previous to his bankruptcy had shipped certain goods of the bankrupt, according to his order, for London, but before the ship's arrival he had become a bankrupt, and the defendant stopped the goods in the Downs on board the ship, it was adjudged that he could not legally do so, his lien being gone by the shipping of them to the bankrupt's order.

And in the cases before cited, of bankers, wharfingers, &c. they were decided on that ground on evidence at *Nisi Prius*.

3. "In the case of *pawns*. The pawning, from the nature of the transaction, creates of itself a lien."

And where a testator had borrowed a sum of money upon jewels, and afterwards borrowed three other several sums, for each of which he gave his note, without taking any notice of the jewels, it was determined in Chancery, that the borrower's executors should not redeem the jewels without paying the money due on the notes; for it must be presumed that the pawnee trusted to the pledge he had in his hands, by the money being lent subsequent to the pawning, which excluded the presumption of any trust to the person: but if the loan had been prior to the pawning, there had been no lien.

"But though the act of pawning creates a lien in favour of the pawnee, yet it cannot give him a greater interest in the thing pawned than the pawner himself had."

Therefore where a tenant for life of plate pawned it to a pawnbroker and died, it was adjudged, That though the pawnbroker had no notice of the property the person pawning had in the thing, that he could have no lien on the plate as against him in remainder.

4. In the case of *ships*, if a person in England repairs a ship, he has no lien against the body of the ship for the repairs done to her: though for repairs done beyond sea, the master may hypothecate the ship herself. *Vid.* Chap. of Assumpsit.

So neither has the master any lien on the ship for any money expended by him in repairs on her in England, or for money due for his own wages; for such contracts are entirely personal.

"But where a person saves goods out of a ship which is in danger, he shall have a lien on the goods for salvage."

As where the ship took fire, and the defendants, at the hazard of their lives, saved the goods; it was held by Chief Justice Holt, that

Ex parte Deane,
6 Ark. 237
& 228.
Drumman v.
Mathews,
Prec. Chanc.
580. S. P.

Sweet v. Pyne,
1 East, 4.

Domainbrey v.]
Prec. Chanc.
419.
2 Vern. 691.
S. C.
quot. 1 Ark. 236.

Hoare v. Parke,
2 T. Rep. 376.

Ex parte Shank,
1 Ark. 234.

Wilkins v.
Carmichael,
Doug. 97.

Hartford v.
Jones,
1 Ld. Raym.
398.

Woolf v.
Summers,
2 Campb. 631.
Robinson v.
Walter,
3 Bullt. 268.
1 Rolle's Rep.
449.

York v.
Grindstone,
Salk. 388.

Jones v. Pearle,
1 Stra. 557.
Warbrook,
v. Griffin,
2 Brownl. 254.

Per Ld. Kenyon,
Hunter v.
Barkley,
Sitt. Mich.
32 G. 3. MSS.

Jones v. Pearle,
1 Stra. 557.

Moss v.
Townlend,
quot. 3 Bullt.
271.

Skinner v.
Upshaw,
2 Ld. Raym 752.
Rushforth v.
Hadfield,
6 East, 524.

Rushforth v.
Hadfield,
7 East, 224.

Lambert v.
Robinson,
4 Esp. N.P. Cas.
119.
Per Ld. Mans-
field,
Douglass. 226.

that in trover for the goods, the defendants might give in evidence, that they detained them till paid for the salvage.

So the master of the ship has been held to have a lien on the luggage of a passenger, for his passage money.

5. *An innkeeper* hath by law a right to detain an horse left with him till he is paid for his keeping; for as he is by law compellable to receive a guest and his horse, so he shall have this remedy. And though in this case the horse had been brought to the inn by a stranger, without the owner's knowledge, and was afterwards claimed by the owner, yet it was held, That the innkeeper might notwithstanding keep the horse till paid; for so by pretended ignorance that his horse was sent to an inn, might the owner defraud the innkeeper by getting his keeping for nothing.

So that to give this right of retainer, it is not therefore necessary that the owner should be a guest; for merely leaving his horse at an inn gives this right of retainer till paid for his keeping to the innkeeper.

But this power of retaining is only *while the horse remains in the innkeeper's possession*; for if he suffers the horse to be taken away, and the horse is brought again to his inn, he cannot retain him for the former demand.

And this privilege of retainer is confined to innkeepers; for a *livery stable-keeper* has no such privilege to detain an horse for his keeping; for it is allowed to innkeepers on the ground of their being obliged to receive guests and their horses; but that is not the case of livery stable-keepers, who rely on the contract.

So the innkeeper cannot *sell* the horse except in *London*, where, by the custom, he may sell the horse for his keeping; and therefore in this case, where an innkeeper had been in debt to an innkeeper at *Glastenbury* for the keeping of his horses, and he seized and sold three of the carrier's horses, the carrier recovered in this action.

So by the customs of *London* and *Exeter*, if an horse at an inn eats out the price of his head, the innkeeper may have a reasonable appraisement of his value made by four of his neighbours, and *take him as his own*, according to that valuation, for his debt.

6. So a *carrier* may detain goods entrusted to him to carry, till he is paid for their carriage.

This lien is confined to the particular goods in question for which he has a lien; but he has no lien for a general balance, though such may be given by agreement, or arise out of a particular notice which he may give; but evidence of his having stopped goods for a general balance on particular occasions will not establish his right to such a retainer for his general balance.

Neither will a few instances of carriers having done so, establish a general lien, for it is a derogation of the common law, and must be strictly proved.

But a carrier or warehousman has no lien on goods for booking or warehouse-room when the goods are taken by the owner from the waggon, and have never been in the warehouse.

7. "*An attorney* has a lien against the papers, &c. of his client, "and may retain them till paid his bill of costs."

But

But where a *clerk in court* advanced money to a solicitor to carry on a cause, it was adjudged, That *he* could not obtain the client's papers as a pledge for the money advanced by him to the solicitor, but should have recourse to the solicitor himself.

Grey v.
Cockerell,
2 Atk. 114.

Where a deed respecting real property was deposited as a security for an annuity, it was ruled by Lord *Kenyon* as implying an intention to charge the real property, and to give the party a lien with whom it was deposited.

Richards v.
Borrett,
3 Esp. N. P. Caf.
103.

8. "But where this right of lien is admitted for the benefit, "or by the usage of the trade, it shall be confined in its operation "to that only."

Therefore where the owner of five cows put them to pasture with the defendant, and agreed to pay him 12d. *per* week for each cow, and afterwards the owner sold them to the plaintiff; it was adjudged, That the defendant could not justify the detaining them for *their keeping*, but was put to his action against the first owner.

Chapman v.
Allen,
Cro. Car. 271.

So if an horse be distrained to compel an appearance in the hundred court; after an appearance, the person who took the horse cannot justify detaining him till *paid for his keeping*.

Linton v. Cook,
H. 9 G. 2.
Bull. N. P. 45.

So where *A.* purchased an interest in a lease, and the writings were left in the hands of an attorney to draw an assignment, which he did, and it was executed; it was held, That he could not refuse to deliver it up to *A.* till paid for it.

Anon.
1 Ld. Raym.
738.

So where the defendant paid the duty at the custom-house for a parcel of goods, the property of the plaintiff, which had come home in the same ship with other goods of the defendant's, it was held, That he should not retain the goods till paid what he had advanced for the duty; for he might have his action for the money.

Stone v.
Lingwood,
1 Stra. 651.

This case of *Stone v. Lingwood* has been over-ruled by Lord *Mansfield*. Vide 4 *Burr.* 2218.

So where in trover for a dog, the defendant justified the detaining him, on the ground that the dog had strayed casually to his house, where he had kept him twenty weeks, and demanded the expence of his keeping; on a case made, Whether the refusal amounted to a conversion? the defendant's counsel declined to argue it; so the *posse* was ordered to the plaintiff.

Binfied v.
Buck,
2 Bl. Rep. 1117.

So where a quantity of timber, which had been placed in a dock on the river *Thames*, and the ropes had loosened, in consequence of which the timber floated down the river, and was left by the tide on a towing-path at *Wimbledon*, where it was found by the defendant, and conveyed into a place of safety for the owner; it was adjudged in this case, That the defendant could claim no lien against the timber for the expences of the carriage and removal, &c. of it, but was bound to redeliver it to the owner, though he might perhaps have an action against the owner for the expences so incurred for his benefit.

Nicholson v.
Chapman,
2 H. Black. 254.

"And in general, no person can in any case retain where "there is a *special agreement to pay*, for then the party benefited is "personally liable."

For where the defendant, who was a farrier, undertook to cure the plaintiff's mare for a certain sum, he performed the cure, and

Brenan v.
Currant,
Sayer's Rep.
224.

and then refused to deliver her up till paid for her keeping and cure; the plaintiff brought trover for the mare, when it was adjudged, that the defendant having *made an agreement* for a certain sum, that he must sue on the agreement; and had no right to retain the mare till he was paid.

Pultney, Bart.
v. Keymer et al.
3 Esp. N.P. Cal.
182.

9. "In the case of brokers. It has been held, that if a broker advances money and gives his acceptance on the credit of goods lodged in his hands, the owner cannot demand them without a full indemnity: and that giving his counter-acceptance, or those of any other person, to the amount of those given by the broker, and becoming payable at the same time is not a sufficient indemnity in law."

Spears v.
Hartley,
3 Esp. N. P. Cal.
81.

In this case it was ruled by *Lord Eldon* at *Nisi Prius*, That where by the custom of trade, a person had a lien on goods for a general balance, that he could hold them for his whole demand, though part was void by the statute of limitations.

Boardman v. Sill,
1 Campb. 410.

And if one having a lien upon goods, when they are demanded of him, claims to retain them on a different account, making no mention of a lien, trover may be maintained for them without evidence of a tender to the amount of the lien.

For if there is a lien, the party on tendering the amount of the lien may maintain trover if the goods are refused to be delivered after such tender.

Mead v.
Hammond,
1 Stra. 505.
Jones v. Hart,
Salk. 441.
1 Ld. Raym. 738.
S. C.

5. Trover will lie against the master for goods which were delivered to the servant.

But in such case it is not sufficient that the goods were delivered to the servant, unless it appears that the goods came to the hands of the master, or unless the servant was usually employed by the master to receive the goods in the way of the master's trade: as in this case, which was a pawn delivered to a pawnbroker's servant, and which being lost, the pawner recovered in trover against the master.

Perkins v.
Smith,
1 Will. 328.
ante 580.

So trover will lie against the servant himself for disposing of the goods of another person, though to his master's use, and that whether he had authority from his master to do so or not.

Brown v.
Hedges,
Salk. 290.
2 Ref.
Holliday v.
Camfield,
1 T. Rep. 658.

6. One tenant in common, joint tenant, or partner in a chattel, cannot have trover against his companion; for the possession of one is the possession of all.

Therefore where the plaintiff was a member of an amicable society, and kept the box containing the subscription, which the defendant, who was also a member, took away; it was held, That they were tenants in common of the box, and so that one could not maintain trover against the other.

"But this is only in cases where the property is equal; so that the possession of the one is the possession of the other."

West v. Pas-
more, at Exon,
per Turton,
Just.
Bull. N. P. 35.

For where there were two tenants in common of lands, the one in fee, the other for years, and the tenant in fee cut trees, which the tenant for years converted to his own use; it was held, That the other might have trover for them, for they belonged entirely to the inheritance.

Co. Litt. 200. 2.

"So if one tenant in common destroys the thing held in common, the other may have trover against him for it, for that

"that is a *total* conversion to his own use of what he had only a part."

As where one part-owner of a ship took her and sent her on a voyage to the *West Indies*, where she was lost, and the other owners having brought an action for it; Lord *King* left it to the jury, Whether, they being tenants in common of the ship, this was not a *destruction* by the defendant? and the jury found accordingly, and the plaintiff recovered.

Barnardiston
v. Chapman,
& Smith,
Hill. 1 G. 1.
Bull. N. P. 34.

"But though one tenant in common takes to himself the whole thing of which he is tenant in common with another, if it is to use it in the way in which it may be made useful and profitable to both, trover will not lie."

As where by the custom of the Southern Whale Fishery, if a whale is struck by one ship and taken by another they are tenants in common; one ship taking the whale and cutting it up, and making it into oil, is not such a taking and conversion as will entitle the other to maintain trover.

Fennings v.
Ld. Grenville,
2 Taunt. 241.

But otherwise in the case of *partners in trade*, each has a power fully to dispose of the whole partnership effects, and even if one of the partners becomes a bankrupt, yet every act of the solvent partner without knowledge of the act of bankruptcy, as in making consignments or sales of goods, &c. if done *bona fide* and without fraud, is good, so that the assignees of the bankrupt partner cannot recover by this action the goods so disposed of by the other; neither, if the solvent partner afterwards becomes himself a bankrupt, can the assignees, under the joint commission against both, maintain trover against the *bona fide* vendee or consignee of the partnership effect.

Fox v. Hanbury,
Cowp. 445.

7. Trover will not lie against *executors or administrators* for a trover and conversion of goods by their testators or intestates; for it is founded on a tort; and actions founded on torts committed by the testator or intestate, cannot lie against executors or administrators.

Hamblly v.
Trott,
Cowp. 375.

8. Trover will lie against *baron and feme* whenever the conversion has been by the wife before coverture, or by herself after coverture; for it being a tort by her, she shall be joined with her husband in the action.

Marth's case,
1 Leon. 312.
Own. 48.
Drape v.
Fulkes,
Yelv. 165.
Sir W. Jones,
143.

9. Trover will not lie for the taking of a thing for the purpose of doing a service to the owner with it, or out of a motive of charity or good nature to tender.

As where the defendant, his vessel being on fire on which the plaintiff was working, took a boat belonging to the plaintiff to endeavour to extinguish the flames, and in doing so it was lost. The action was held not to lie.

Drake v.
Shorter,
4 Esp. N. P. Cas.
160.

3. OF THE PLEADINGS AND EVIDENCE IN THIS ACTION.

1. OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

1. In trover the conversion is the gift of the action, and the manner in which the goods come to the defendant's hands is but inducement; the plaintiff may therefore declare upon a *devenerunt*

1 Danv. Abr.
23.
Bull. N. P. 33.

ad manus generally, or specially *per inventionem*, (even though in fact the defendant came to them by delivery,) or that the defendant fraudulently obtained them (as by winning them at cards from the plaintiff's wife); and this being inducement, need not be proved: but it is sufficient to prove property in the plaintiff, the possession of and conversion by the defendant.

2. It was formerly usual to tie up the plaintiff to great strictness, in specifying in the declaration the nature, quality, and quantity of the goods for which the action was brought; and numberless cases in the old books, of arrests of judgment in trover, turn upon that objection. But greater latitude is now allowed: as a declaration *for one parcel of packcloth*, without setting out the exact quantity, has been held to be good; so *for fifty pieces of square timber*.

Therefore in trover for a *debenture* against the defendant, in whose possession it was, it was ruled, That the plaintiff need not set out *the number* of it, nor in trover for a *bond* need he set out the date; for being out of possession, he might not know the exact number or date: but if he does in his declaration set out the number or date, he *must prove it exactly as laid, and the sum to a farthing; or he shall be nonsuited*.

3. "The declaration in trover should state *the time* of the conversion; and for want of alleging it, judgment was in this case arrested."

But where the plaintiff in his declaration under a *scil.* laid the conversion on *a day before the finding*, and this was alleged in arrest of judgment, the Court held, nevertheless, that the *postea convertit* was sufficient, and the *scil.* being inconsistent to be void.

4. So the declaration should state *a place* where the conversion was made, or the declaration will be ill in substance for want of a venue.

But the want of a place is aided if the defendant pleads a special plea, as a sale in market overt, *viz.* at *S.* in *Com. Nott.* for then a *venue is laid in the plea*: but where the plea is so, the proof of a sale in another place in market overt will not support the declaration.

But though a time and place of conversion must be alleged in the declaration, yet the action being transitory, the conversion may be laid here, and proved in Ireland.

5. The declaration in trover need not allege *the value of the goods*, aliter in detinue, where the goods themselves are to be recovered or the value of them.

6. In trover by *baron and feme*, it is bad to declare that the defendant converted the goods *ad damnum ipsorum*, for the possession of the wife is the possession of the husband, and so is the property; the conversion therefore cannot be to the damage of the wife, but of the husband only.

So for the same reasons, in trover *against* baron and feme, the conversion must be laid *to the use of the husband* and not *to her, or their use*; for she can have no property in things personal during coverture.

Bottomley v.
Harrison,
2 Stra. 809.

Per Holt, at
G. Hall, 1707,
Bull. N.P. 37.

Wilson v.
Chambers,
Cro. Car. 262.

1 Brownl. 8.
1 Vent. 135.

Tesmond v.
Johnson,
Cro. Jac. 428.

Hubbard's case,
Cro. Eliz. 78.

Anon.
Clayt. 131.

Brown v.
Hedges,
Salk. 290.
1 Ref.
Godwin v.
Harwood,
2 Roll. Rep.

Nelthorp et ux.
v. Anderson,
Salk. 114.

Berry v. Nevis,
Cro. Jac. 661.

7. In declaring in this action by *an executor*, it seems not to be material that the declaration should state the time of the conversion, whether in his own time or in that of his testator, as the executor may in either case well support the action.

Eliz. Countess of Rutland v. Ifab. Countess of Rutland, Cro. Eliz. 377.
2 Ref.
Rivers v. Goddard, Cro. Eliz. 568.

So as an executor is possessed of his testator's goods, *ut de bonis propriis*, he may declare for them in that manner, and yet that the conversion of them was *in retardationem executionis testamenti*.

8. In trover by *an administrator*, he may declare generally that administration was granted to him, by *A. B.* official of the Bishop of ———, without saying that he was ordinary of the place, or had the right of granting administrations.

Lacy v. Smith, Cro. Eliz. 102.

So an administrator may declare that he was possessed of divers goods and chattels as of his own proper goods; and though they were the testator's in fact, yet the declaration is good.

Hudson v. Hudson, Latch. 214.

In trover by an administrator for rum taken and converted in the lifetime of the intestate: upon evidence it appeared, that the rum had been taken in the testator's lifetime, but converted after his death; and this evidence was held to maintain the declaration; for the time of using the rum lay in the breast of the defendant, who ought to have disclosed it by his plea, and the taking in the intestate's lifetime and keeping it till his death, was sufficient to maintain the declaration.

Crozier v. Ogleby, 1 Stra. 60.

9. If an action is brought by the assignees of a bankrupt; and it appears that after the commission, the bankrupt had given property to the petitioning creditor in diminution of his debt, for which, by stat. 5 Geo. 2. c. 30. the commission may be superseded; it is no defence at law to nonsuit the plaintiff, for the commission must be superseded by petition to the Chancellor.

Garratt v. Sir Thos. Biddulph, 4 Esp. N. P. Cal.

I. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

1. "As this action equally lies where the taking has been tortious, or where the defendant lawfully has obtained possession of the plaintiff's goods, and afterwards converted them; what shall be evidence of a conversion, is settled by the two cases following, viz.

That where an *actual taking of the goods in question* without any title, is given in evidence, that is sufficient, *without shewing a demand and refusal*, for it is an actual conversion: but when defendant comes to the goods *by finding, delivery, or bailment*, (for example,) there an actual demand and refusal must be shewn in order to establish a conversion, unless an actual conversion can be proved; in which case it is not necessary to prove a demand, proof of the conversion being sufficient.

Bruen v. Roe, Sid. 264.
Beckwith v. Elvey, Clayt. 112.

And therefore where a bankrupt, in contemplation of insolvency, and with a view to defeat his creditors, made a pretended sale of his goods to the defendant, and the assignees brought trover for them, but had neglected to make a demand; they were nonsuited, which the Court refused to set aside. For at the time of the delivery of the goods both parties were able to contract. There was no unlawful

Nixon v. Jenkins, 2 H. Black. 135.

lawful taking of the goods; and as the assignees might have affirmed the contract, but in fact had disaffirmed it, they should have demanded the goods.

Eaton v.
Newman,
Cro. Eliz. 495.
3 Burr. 1423.

But in general, a demand and refusal is sufficient evidence of *conversion*.

Though it is not of itself a conversion; for if the jury find only a special verdict, *viz.* that there was a demand and refusal, the Court cannot adjudge it a conversion.

Logan v.
Houlditch,
Esp. N. P. Caf.
22.

"A personal demand is not necessary to maintain this action."

For it was in this case ruled by Lord *Kenyon*, at *nisi prius* that a demand in writing left at the house of the defendant was sufficient.

"For a refusal on demand may be justifiable and lawful under particular circumstances."

Per Coke, Ch. J.
4 Bull. 312.

As if a person finds my goods, and I demand them; and he answers, that he knows not whether I am the true owner or not, and therefore refuses to deliver them, this is not to be deemed a conversion to his own use, as *he keeps them for the owner*.

Solomon v.
Dawes,
Esp. N. P. Caf.
32.

So in trover for a box of jewels, the demand was made by the plaintiff's wife. The defendant refused to deliver it on the ground that he did not know her. Lord *Kenyon* laid down this general doctrine, That where the defendant refuses to deliver the things on the ground that he does not know to whom they belong, and therefore keeps them till that is ascertained; or that the person who applies for them is not properly empowered; or until he is satisfied of the authority of the person applying; in none of these cases is a bare denial evidence of a conversion.

"So where the person has a *lien* in the cases before mentioned, he may lawfully refuse to deliver the things when demanded, till satisfied to the amount of his *lien*."

2 Show. 161.

As an innkeeper may refuse to deliver an horse standing at his inn till paid for his keeping.

1 Lord Raym.
752.

Or a carrier to deliver goods, till paid for the carriage; these refusals being lawful, cannot amount to a conversion.

"But a demand and refusal is only presumptive evidence of a refusal; for if it appears that there has been no conversion in fact, this action will not lie."

Anon.
Salk. 655.
2 Ld. Raym.
752.
5 Burr. 2827.

As in trover against a carrier for goods, *which appear to have been either lost or stolen*, in such case denial is no evidence to support the conversion necessary in this action, since the contrary is proved, though the carrier would be liable under the custom of the realm; but if this did not appear, or if the carrier had the goods in his custody when demanded, it had been good evidence of a conversion. *Vide Ross v. Johnson, ante 580. S. P.*

2 Mod. 245.

So if the defendant had cut down the plaintiff's trees, and left them on the ground, this could not support a conversion, since it is plain that they were left in the plaintiff's possession.

So if the refusal was *as ante*, until the real owner was known, or on account of a *lien*.

Rookeby's case,
Clayt. 122.

2. A demand of *satisfaction* for goods taken, and a refusal, was in this case adjudged to be sufficient evidence of a conversion, though there was no demand of the goods themselves.

So

So where the demand was of *payment* for the goods, of which the defendant had obtained possession, and converted to his own use; and it was objected that a demand of payment was affirming a contract for the sale of the goods, and so should not be good in trover which was founded in a tort. Lord *Kenyon* ruled it to be sufficient to maintain the action.

Thompson v. Shirley,
Esp. N. P. Cal.
31.

3. If the plaintiff proves the goods to have been in his possession, it is *prima facie* evidence of property; but the defendant may prove them to be the goods of *J. S.* who died intestate, and that letters of administration have been granted to him: but such evidence will not be conclusive against the plaintiff; for he may shew that he was married to *J. S.* and so entitled.

Blackman's case,
Salk. 290.

4. In trover by a stranger for goods taken at sea, he must shew, in order to support this action, besides a property in himself, first, That his sovereign was in amity with the king of *England*; secondly, That his sovereign was in amity with the sovereign of the defendant; for if there was a war between them, then the capture would be legal.

4 Inst. 154

5. As to the evidence in actions under commissions of bankrupt, it has been decided,

1. That a man cannot be a witness to prove an act of bankruptcy committed by himself; but his confession to a third person at the time, that he went out of the way to prevent being arrested, or to such like facts as are acts of bankruptcy, is admissible evidence, if made before the bankruptcy.

Bateman v. Bailey,
5 T. Rep. 512.
Ewens v. Gould,
per Hardwicke,
Ch. Just.
Hil. 8 Geo. 2.
Bull. N. P. 40.
Chapman, Aff. v. Gardner
2 H. Black. 275.
Field v. Curtis,
2 Stra. 829.

Neither can he be admitted as a witness to prove the petitioning creditor's debt, or any other fact necessary to support the commission, though he has his certificate.

So a verdict upon an issue directed out of chancery to which only one of the defendants was party, may be read against all to prove the time of the act of bankruptcy.

So no release can make the bankrupt's wife a witness to prove an act of bankruptcy committed by the husband.

Ibid.

Yet where the bankrupt's wife was called to prove a payment made by her husband in contemplation of bankruptcy, Lord *Kenyon* rather seemed to think she might be admitted.

Jourdain et al. Aff. Nowlan, v. Lefevre,
Esp. N. P. Cal.
67.

But a creditor who releases to the assignees, is a good witness to prove the act of bankruptcy.

Hooper v. Chapman,
Peake N. P. C.
19.

By statute 5 Geo. 2. 30. 41. "The depositions of the witness taken before the commissioners, as to the act of bankruptcy, &c. are, upon petition to the chancellor, directed to be recorded, which record shall be evidence of the several matters contained therein, after the death of the witnesses."

Under this statute it was decided, on a question respecting the time when the bankrupt became so, that the depositions so taken before the commissioners, and recorded pursuant to the statute, were good evidence to prove the precise time when the act of bankruptcy was committed; it being proved, that the witness who had proved the act of bankruptcy before the commissioners was dead.

Janfon Aff. of Burton v. Willon,
Doug. 144.

Wilson v.
Norman,
Esp. N. P. Cal.
334.

2. Where the act of bankruptcy was the bankrupt's absconding to avoid being arrested for a debt, general proof of absconding was held sufficient, without shewing any writs to have actually issued against him.

Per Buller, Just.
Doug. 206.

3. "In proving the debt of the petitioning creditor, it must be done by the same evidence which would be required in an action against the bankrupt."

Abbot et al. Aff.
of Farr v. Plumb.
Doug. 205.

Therefore where the petitioning creditor's debt was money due on a bond, and the evidence to prove it was, *that the bankrupt had acknowledged to the witness that he was indebted to the petitioning creditor the amount of the bond, but the subscribing witness was not produced*, it was adjudged to be insufficient, and the plaintiffs were nonsuited; for proof by the subscribing witness is the only legal evidence in an action on the bond.

Bowles v.
Lanworthy,
5 T. Rep. 366.

However in this case, which was an action of trover by the assignees of a bankrupt to recover goods of the bankrupt, taken by the defendant under a bill of sale given to him by the bankrupt, and which bill was the act of bankruptcy relied on, it was held sufficient proof, to produce the defendant's *examination before the commissioners, in which he admitted the execution of the bill of sale*, without producing the subscribing witness.

Downton et al.
v. Crofts,
Esp. N. P. Cal.
168.

So in this case, which was trespass on the case against the sheriff for a false return, for the purpose of trying the right of the assignees of a bankrupt to certain goods taken by the defendant under an execution at the suit of another creditor subsequent to the commission; the evidence of the petitioning creditor's debt was an acknowledgment by the bankrupt to the witness that he was indebted to the petitioning creditor in the sum of 100*l*. and upwards; but this was made on the same day the act of bankruptcy was proved to have been committed. Lord Kenyon ruled, *That such an acknowledgement made at any time before suing out the commission was sufficient to support it.*

Robson v. Kemp,
4 Esp. N. P. Cal.
232.

But the declarations of a bankrupt, as to the view with which he went out of the way or executed a deed, though admissible as evidence of an act of bankruptcy at the time when such matters constitute an act of bankruptcy, as being part of the *res gesta* at the time; yet, if made at a subsequent time, they are no evidence.

4. "In actions to recover any part of the bankrupt's property, a creditor is clearly from interest an incompetent witness."

Granger v.
Furlong,
2 Black. Rep.
1273.
Ante, 97.

But where, on a motion for a new trial, on the ground that a creditor who had proved a debt under the commission had been admitted to prove the debt of the petitioning creditor at the trial, it appeared that he had *sold his chance of recovering his debt* to another person for less than five shillings in the pound, and had released the assignees, and so in fact had no interest, he was held to be a competent witness to support the commission.

Evans v. Gold,
1 A. Hardwicke,
8 Geo. 2.
Mull. N. P. 43.

So the bankrupt cannot be a witness to swear property in himself, or a debt due to himself, unless he has his certificate, and give

gives a release of his share of the surplus after the dividends; but he may prove property in or a debt due to another, without obtaining his certificate.

For the rule is, That an uncertificated bankrupt may be a witness to diminish the fund which is to pay his creditors, by proving the property out of himself, for so he swears against his own interest; but he cannot be a witness to prove property in himself without a release, for that is to increase the fund, and so he is interested.

Butler v. Cooke,
Cowp. 70.

Therefore where a trader has been *twice a bankrupt*, in an action by the assignees under his second commission he is an incompetent witness, even with a release, *unless he has paid fifteen shillings in the pound*; for he is not merely interested in the surplus and dividends on that commission, but has a farther interest, *viz.* to discharge his future effects, which he does by increasing the fund of his second commission, as his future effects are liable in case he does not pay fifteen shillings in the pound. This objection was taken by the Chief Justice himself at *nisi prius*.

Per Ld. Kenyon
Kennet v.
Greenwollers,
Weilm. Sitt.
Hil. 30 G. 3.
MSS.

4. The rule is general, that in all actions by assignees of a bankrupt the plaintiffs must prove the regular steps of trading, petitioning creditor's debt, act of bankruptcy, &c.—However, to this there were exceptions.

1. As where the action was against the bankrupt himself, and he pleaded his certificate; the plaintiffs relied, that he had been a bankrupt before, and had not paid fifteen shillings in the pound on his second bankruptcy; but to prove the first bankruptcy only produced the commission and the proceedings under it, but did not prove any of the steps above mentioned. On the case coming before the court of *K. B.* they held, that as against the bankrupt himself, it was sufficient evidence, he having surrendered under it.

Haviland v.
Cook,
5 T. Rep. 655.

2. So where the assignees of a bankrupt employed an auctioneer to sell part of the bankrupt's property, and he advertised it as such; in an action for the proceeds of the sale, it was held by Lord Kenyon, that the plaintiffs need not prove the trading, act of bankruptcy, &c. for the defendant could not contest the character of the plaintiffs, in which he had been employed by them.

Mallby v.
Christie,
Esp. N. P. Cal.
342.

In this respect, however, the law is altered now by stat. 49 G. 3. c. 121., which enacts, "That in all actions brought by or against the assignees of a bankrupt, the commission and proceedings before the commissioners shall be received as evidence of the petitioning creditor's debt, and of the trading and act of bankruptcy, unless the other party, if defendant, at or before the time of his pleading to the action, and if plaintiff, before issue joined, give notice to the assignees that he means to dispute such matters, or any of them; and if, at the trial, the assignee shall prove the matter so disputed, the judge who tries the cause shall certify that such proof was made, and the assignees shall be entitled to his costs."

The commission must, however, still be produced and the assignment proved.

3. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

Devoe v.
Dr. Coridon,
1 Keb. 305.

1. It is said by Justice *Twissden* in this case, that there is no plea in trover but the *general issue*, and the *special one of a release*; for every plea in justification is tantamount.

But, however, numberless special pleas allowed appear in the books; and Lord Chief Justice *Holt*, in *Salk.* 654, allows this one following to be of that description, though he says, That it is the only good special plea in the books, *viz.*

Kenicot v.
Bogan,
Yelv. 198.

To trover for two pipes of wine, the defendant pleaded, that so much is due to the king out of every twenty pipes of wine imported *for prisage*, and for which he took the wine in question; this plea was held to be good.

Parker v.
Norton,
6 T. Rep. 695.

It was in this case attempted to plead bankruptcy in bar of an action of trover for a bill of exchange which had been delivered to the bankrupt, and converted to his own use before his bankruptcy; but on demurrer it was over-ruled.

But other special pleas have been allowed.

Lechmere v.
Toplady,
Show. 146.

As where the defendant pleaded, that the plaintiff had had a *judgment in trespass* against him for taking the same goods; it was ruled to be a good plea.

Brown v.
Wooton,
Cro. Jac. 73.

So a recovery in trover for the same goods against *J. S.* was held to be a good plea. So if the trover had been against the defendant, and the plaintiff had recovered.

Adams v.
Broughton,
2 Stra. 1078.

For where there is a recovery in trover, as the plaintiff is supposed to get damages to the value of the goods, they then become *the property of the defendant*, so that the plaintiff in neither case has a property in the goods.

“So that it seems that all these cases of justification may be given in evidence under the general issue.”

Dane v. Walter,
in Kent, 1682.
Bull. N. P. 48.

As where in trover for taking a gun, the defendant pleaded the general issue, and gave in evidence that he was gamekeeper of the manor of *B.* and took the gun under stat. 22 & 23 *Car.* 2. it was held to be well; though as the act does not authorize the pleading the general issue, it would be otherwise in trespass.

It will however be proper to mention some cases of good justification in this action, so as to enable defendants to avail themselves of them for their defence, whether in the form of a plea, or as evidence under the general issue.

Culling v.
Tuffnall,
per Treby, C. J.
at Hereford,
1694.
Bull. N. P. 34.

1. As where the defendant to an action of trover for ten loads of timber, pleaded “That he was tenant to the plaintiff, and had erected a barn on the premises, and put it upon blocks and timbers lying upon the ground, but not fixed in it, and which it was the custom of the country so to fix, and carry away at the end of the lessee’s term,” it was held to be a good justification; and the defendant had a verdict.

Poole’s case,
8ilk. 368.

So things fixed to the freehold, and *set up by the lessee for the convenience of trade* (as vats, coppers, tables, &c.) may during the term be removed by the lessee, and are liable to be seized and sold

fold by the sheriff under a *feri facias*, issued against the lessee who erected them.

For though the general rule of law is, That things fixed to the freehold cannot be removed, yet this has of late years admitted many exceptions, and many things are now allowed to be carried away, which could not formerly; as marble chimney-pieces, &c. and still more, fixtures for the benefit of trade; as brewing vessels, cyder mills, and such like: this is as between landlord and tenant, and tenant for life or in tail, and the reversioner; but the rule still holds as between heir and executor.

Therefore where the case was, that the tenant had erected a wooden building for the purpose of making varnish, on a brick foundation let into the ground, with a chimney belonging to it: it was decided that he might take away the wooden superstructure, and all the materials of it. Bull. N. P. 34.
Penton v. Robart,
2 East, 88.

But a distinction is held to exist between such fixtures as are put up for the benefit of trade and those put up by a tenant in agriculture: as these last, if fixed at all to the freehold, such as was a beast-house, cart-house, &c. it was decided, could not be removed by the tenant at the expiration of his lease. Elwes v. Maw,
3 East, 38.

But in this case, which was trover by the executor against the heir, the Chief Justice held, That hangings, tapestry, and iron backs to chimnies, belonged to the executor; who recovered accordingly. Harvey v. Harvey,
1 Stra. 1142.

2. In this case the defendant justified the detention of goods as wreck, the goods having been cast on shore, and no animal having escaped alive from the wreck, so that they belonged to the grantee of the crown: but it was resolved, That if by any marks, as the initials of the owner's name on casks, *ex gr.* or by any means the property can be traced and clearly made out, that such goods shall not be deemed wreck, but belong to the owner, though nothing living has escaped from the ship. Hamilton v. Davis,
5 Burr. 2732.

3. In trover for goods, the defendant justified, "That by prescription, every shop in London should be a market overt for all wares sold there, and that the goods were so bought there;" it was adjudged, That the custom was too general and unreasonable; for a sale is only good as in market overt, where a thing is bought which appertains to the trade of that shop, as plate at a silversmith's, &c. but not if bought in a back-shop or place not open, or in a shop whose trade is in goods or wares of a different nature from those sold. Palmer v. Woolley,
Cro. Eliz. 454.
3 Co. 83. 8. C.

4. In trover for goods, and conversion of them at *D. in com.* Nottingham, the defendant justified, "That he recovered against the plaintiff a debt of 20*l.* by bill in *K. B.* and had thereupon a *fi. fa.* directed to the sheriff of the county of York, who at Wakefield, in that county, seized and delivered to him the goods in question," and so justified the conversion; on demurrer, the plea was held to be ill, because the sheriff cannot deliver the defendant's goods taken in execution, to the plaintiff, in satisfaction of his debt. Thompson v. Clark,
Cro. Eliz. 504.

5. The defendant in this case justified the taking of the goods as bailiff of the king for a distress upon a plaint in curia manerij, Gomerai v. Wyatt,
Cro. Jac. 255.

and selling them; this on demurrer was held to be bad; goods taken upon a *disfringas* should not be sold, especial court-baron, though it were the king's.

6. "Therefore a plea in justification should always be a *complete title*."

Davies's case,
Cro. Eliz. 611.
Foxley's case,
4 Co. 109.

As where the plea was a justification of the taking as *was* held that the plea should state that a felony was committed and that the goods were waived by the thief, or it is bad. *Lowe v. Lambert*, Cro. Eliz. 716. S. P.

Agars v. Lisle,
Hutt. 20.

So the plea in justification should either *traverse the conversion or confess and avoid it*; for the conversion is the gift of the goods and it is not therefore sufficient to justify the taking only.

2. Another plea in this action is *the statute of limitations*, which it is enacted, "That actions of trover must be commenced within *six years* after the cause of action accrued, by stat. 21. c. 16."

1. "This statute begins to run from *the time of the conversion* for then the cause of action accrues."

Wortley Montague v. Lord Sandwich,
Farrelley, 99.

For where an executor left furniture of the testator's house by consent of the heir, who used it, and afterwards refused to deliver it to the executor when demanded, the executor brought trover for it, and the heir pleaded the statute of limitations; but *per cur.* the user by consent and before demurrer was no conversion, and the refusal, which is the only evidence, being within six years, the action is not barred.

Coles v. Sibbye,
Style, 178.

2. Where to a plea of the statute of limitations, the plaintiff replies that the action was commenced before the six years expired, he ought to set out *the day when the writ was sued out* is not sufficient to say that he sued it out generally in term, or so.

Morris v. Harwood & Pugh,
3 Burr. 1243.

And by no fiction of law of reference to the first day on which the plaintiff be barred of his action; but he shall always be at liberty to aver the true time of suing out the writ.

Brown v. Hedges,
Salk. 290.
3 Ref.

3. If one joint-tenant brings trover against a stranger who is joining his companion, the defendant should plead it in abatement; and cannot take advantage of it on the general issue. 113. Cro. Eliz. 544.

Cheffold v. Messenger, per Parker, Ch. Bar. at Gloucester, 1747.
Bull. N. P. 48.
Blainfield v. March,
Salk. 285.

4. In trover by a rightful administrator against an executor *son tort*, the defendant cannot give in evidence payment of the value of goods, which are still in his hands, but on such as he had sold. *Ante, Anon.* 1 Vent. 349.

If an administrator brings trover on his own possession the defendant may give in evidence on the general issue *a will of the testator*; but if the action be brought on the possession of an intestate, the defendant must plead it in abatement, and cannot give it in evidence on the general issue.

5. In some cases the defendant is allowed to *bring the thing into court* which the action is brought into court.

Anon.
1 Stra. 142.

As in the case of *trover for money*, the Court gave leave to bring the money declared for into Court; but the Court said they would do it in this case only, and *not in trover for goods*.

And so it was in this case denied, which was *trover for goods* which are cumbrous, and require room; but the Court granted a rule to shew cause why on delivery of the goods to the plaintiff and paying of costs, the proceedings should not be stayed.

And where the *goods* are of an ascertained value, and there is no tort to increase the damages, they may be brought into court.

And *note*, That the defendant in this action may be held to special bail, on an affidavit that the goods converted amount to above 10l.

Cook v. Holgate,
2 Barnes, 284.
Fisher v. Prince,
3 Burr. 1364.
Whitten v.
Fuller,
2 Black. Rep.
902.
Catlin v. Catlin,
1 Will. 23.

4. OF THE DAMAGES AND COSTS.

1. OF THE DAMAGES.

"The judgment in trover can only be for *damages*; for the Court will not make an order that the plaintiff shall *take back his goods again, for which the action is brought and costs*, and discontinue his action; for the action is not for the goods, but for damages for the taking and conversion."

Olivant v.
Berino,
1 Will. 23.

So where in trover for an horse the judgment was, That the plaintiff should recover either the horse or damages, judgment was reversed.

Knight v.
Bourne,
Cro. Eliz. 116.

But, however, where the things for which this action is brought can be restored *in specie*, and undiminished in value, it is usual in practice to restore the goods to the plaintiff the owner, and for the jury then to find nominal damages.

And the jury cannot assess damages and costs *together* to more than the damages laid in the declaration; but they may assess the damages to that amount, and the costs beyond it to any amount.

Rivers v.
Godskirt,
Cro. Eliz. 568.
3 Ref.

2. OF THE COSTS.

1. The statutes which take away costs from the plaintiff do not extend to actions of trover; therefore in it the plaintiff is always entitled to full costs when he recovers.

2. The stat. 8 & 9 W. 3 c. 11. which give costs to one defendant who has been acquitted; where there are several (*vid. ante*, chap. of Trespass) does not extend to trover.

Marriner v.
Barret,
Pat. 1 G. 2.
quot.
3 Burr. 1284.

CHAPTER XIII.

The Action of Trespafs on the Cafe.

TRESPASS on the Cafe, is an action brought for the recovery of damages, for acts unaccompanied with force, and which in their consequences only are injurious; for though an act may be in itself lawful, yet if in its effects or consequence it is productive of any injury to another, it subjects the party to this action.

Reynolds v. Clarke,
1 Str. 334.

As where the defendant put up a spout on his own premises this was an act lawful in itself; but when it produced an injury to the plaintiff, by conveying the water into his yard, trespass on the cafe was adjudged to lie for such consequential injury.

Hickeringill's case,
Hil. 5 Ann.

So shooting of a gun, which in itself is an indifferent and lawful act, yet when by it the plaintiff's decoy was injured, this action was held to lie.

Day v. Edwards,
5 T. Rep. 648.

Again where the plaintiff declared *in case*, that the defendant *furiously*, negligently, and improperly drove his cart against the plaintiff's carriage, that it was overturned and broken. This was held ill on demurrer, and that the action should be trespass *et armis*.

In treating of this action, I shall first consider the general nature and description of the action: 2d, The particular injuries for which it lies: 3d, The pleadings: 4th, The evidence: and 5th, The verdict, judgment, &c.

1st. OF THE GENERAL NATURE OF THIS ACTION

1. "It is not necessary to maintain this action, that the injury which the plaintiff has sustained has arisen *from some act* of the defendant; for the action equally lies where the injury has been caused *by the neglect or culpable omission* of any duty it was incumbent on the defendant to perform."

Finch's Law,
188.

As if one retains an attorney to conduct his suit, and in consequence of any neglect the party suffers any loss, this action lies against the attorney for such neglect.

Payne v. Rogers,
2 H. Black. 350.

So if any person suffers his house to be out of repair, and another person suffers an injury in consequence, this action lies. As where it was for suffering some plates or bars which covered a cellar occupied by the defendant to be out of repair, in consequence of which the cellar gave way, and the plaintiff fell through a hole in the pavement into the cellar, and was hurt the action was held to lie against the owner, who was bound to keep the place in repair.

So if a person suffers the ditch which borders his neighbour's Hale on F. N. B. land to become so foul that the water will not run, whereby his 427. neighbour's land is overflowed, this action lies for such culpable omission of what he was bound by law to do.

"But in order to charge a person in this action for any neglect, the law must have imposed a duty on him, so as to make that neglect culpable."

As if a person finds any thing, he is under no obligation by law to keep it safely; and if it therefore is spoiled while in his possession, yet no action lies; for there was no duty by law on him to apply any degree of care. Mulgrave v. Ogden, Cro. Eliz. 219

2. It is no excuse for a defendant in this action, that "the injury was involuntary on his part; for if any damage is caused to another, *from the folly or want of due care and caution* in such defendant, this action lies."

As if a person brings an unruly horse to break in a place of public resort, though he might not intend to do an injury to any person, yet if any one is kicked or otherwise hurt by the horse, he shall have this action; for it was folly and want of care to bring him to such a place for such a purpose. Michael Alestree, 2 Lev. 72.

"So neither is it any excuse for an unlawful act, that by greater attention the person who receives the injury might have avoided it, if he has used ordinary care."

As if a person lays logs of wood across the highway, through which by proper care a person might ride with safety; yet if the horse stumbles over them, and the person be thrown, he may recover in this action for the injury. Fowler v. Saunders, Cro. Jac. 446.

3. "If the injury which the party has sustained has arisen from *his own neglect and folly*, and so might have been avoided, this action will not lie."

As where the plaintiff declared, that he was employed by the defendant to carry a load of timber from Woodbridge to Ipswich, to be laid down where the defendant should appoint, and that he carried it; when the defendant having appointed no place where it was to have been laid down, that the plaintiff's horses were detained in the cold, by which some of them died, and the rest were spoiled: after a verdict for the plaintiff, judgment was arrested; for it was the plaintiff's own fault that he did not take out his horses, and lead them about, or he might have unloaded the timber in any proper place, and have returned. Virtue v. Bird, 2 Lev. 196.

So where the defendant who had during some repairs to his house, put a pole across the street, there being another way for passengers, and the plaintiff riding very furiously and without any care, had rode against it and was thrown down and hurt. It appearing that with proper care he might have avoided the accident, the action was held not to lie. Butterfield v. Forrester, 11 East, 60.

"For per Lord Ellenborough, 11 East, 61, one person's being in fault, will not dispense with the other's using ordinary care for himself. Two things must concur to support the action, an obstruction in the road by the fault of the defendant, and *no want of ordinary care to avoid it on the part of the plaintiff*." The rule therefore seems to be correct as above laid down, 3.

4. "Where-

Co. Litt. 56. a.

Hubert v.

Crimes,

1 Esp. N. P. R.

Payne v.

Partridge,

3 Salk. 12.

William's case,

5 Co. 72. b.

Wile Iveson v.

Moore,

3 Salk. 15.

Anon.

1 Ld. Raym. 739.

2 Salk. 441. S.C.

4. "Wherever a right is of a public nature; that is, is common to all the king's subjects, the mere depriving the public of that right, will not subject the party to an action, for so would actions be without end; the remedy is by information or indictment: but if any individual suffers a particular injury in consequence of being deprived of such right, he may have his action on the case."

As where the plaintiff brought this action against the defendant as owner of a *common ferry*, to which by prescription the plaintiff as an inhabitant of *Littleport*, had a right to pass toll-free, and the action was for refusing to ferry him over, it was held not to lie, for the right of being ferried over was common to all the king's subjects; and for being deprived of that, no remedy lies *without special damage*, which here the plaintiff has not laid; but he might have had his action for *taking toll* from him, he having a particular exemption; but on that he did not declare.

"So where the matter is of a public nature, though confined to a certain body, this action will not lie, without a special injury."

As where the plaintiff declared, that in a certain chapel of ease within the manor of *Wollaston*, the defendant was bound as vicar of *Alderbury*, to celebrate divine service and administer the sacrament to the plaintiff, and his tenants and servants within the said manor; and the action was for the not so celebrating divine service in such chapel of ease; after a verdict for the plaintiff, judgment was arrested; for the chapel being public and common to all the tenants of the manor, then every tenant might have this action, which could not be; but the remedy should be in the spiritual court.

This doctrine was recognized in a modern case of *Hubert v. Groves*, *Esplin. N. P. Cas.* 148. which was an action of trespass on the case for obstructing a way, by laying large quantities of earth, &c. on it, whereby plaintiff was prevented from enjoying his premises in as advantageous a manner as he had before done. It appeared that in fact the way was a public one; but that defendant, by laying rubbish, &c. across, had prevented plaintiff, who was a timber merchant, from using it, and had obliged him to carry his timber, &c. by a circuitous way. This the counsel for the plaintiff (on the objection being made that the remedy should have been by indictment) contended was such a special injury as entitled the plaintiff to maintain this action. But Lord *Kenyon* held that it was not; and that the doctrine laid down in *Co. Litt.* 56. a. was the true one; and the plaintiff was nonsuited. On a motion for a new trial the court of *K. B.* concurred in opinion with His Lordship.

5. "It is to be observed on this action, that any person employing another in any office or employment, is answerable for his misconduct or neglect, or for any injury, which he may occasion in the course of that employment; therefore a master shall answer for the misconduct of his servant."

As where an action was brought against the master, for his servant with his cart having run against the cart of the plaintiff in which was a pipe of wine, which was overturned and spilt, the plaintiff recovered.

Jarvis v. Hayes.
2 Stra. 1004.

But the form of the action may vary according to circumstances. For if, the servant negligently drives his master's carriage, and causes an injury, the master is clearly liable in this action, and trespass *vi et armis* will not lie.

Mosley v. Gainsford,
2 Hen. Black.
442.

But it was held in this case that the master was not answerable for the wilful misconduct of his servant, as by wilfully driving against plaintiff's carriage, by which it was broken.

Savignac v. Roome,
6 T. Rep. 125.

And in this case it was held, that for an injury caused by the wilful act of the servant himself, neither trespass *vi et armis* or any other action would lie against the master, unless it was done by the master's direction.

McManus v. Crickett,
1 East, 106.

But in all cases whereon the injury is the immediate effect of an act of the defendant, the action must be trespass *vi et armis*, and not trespass on the case.

In this case the accident happened on a dark night, when the defendant was driving on the wrong side of the road, and the parties could not see each other. No other blame was imputable to the defendant than being on the wrong side of the road. But the injury having happened by the immediate concussion of the carriages, the Court held that the action should be trespass *vi et armis*.

Leame v. Bray,
3 East, 593.

But in *Rogers v. Imbleton*, 2 Bos. and Pull. N. Rep. 119. Ch. J. Mansfield expressed his disapprobation of this determination.

So if the master order a servant to do a lawful act, and the servant exceeds his authority and thereby commit an injury, the master is not liable.

Kington v. Booth,
Kin. 28.
Middleton
v. Fowler,
1 Salk. 282.

"But in the case of injuries, for which this action may be brought, it must be either brought against the master, or against the servant by whose act the mischief has been done; for it will not lie against a steward or manager.

For where the action was for unskilfully and negligently working a coal-mine under and adjoining to the plaintiff's house, in consequence of which the ground sunk, and the buildings were injured, and was brought against the defendant, who was an agent or manager, appointed under the Court of Chancery (the proprietor being an infant), but who employed a bailiff under him, and hired and dismissed the colliers, but he had no personal interest in the business, was not present when it happened, nor gave any directions for working the mine in the manner by which the accident happened. Lord Kenyon, before whom the cause was tried at *Stafford*, nonsuited the plaintiff, holding the above doctrine, which was afterwards confirmed by the Court of King's Bench on a motion for a new trial.

Stone v. Cartwright,
6 T. Rep. 411.

So where a person, having an house by a high road, contracted with a surveyor to repair it, and the surveyor was to find all materials, and he contracted with a third person to supply them. The servant of the third person laid a quantity of the materials

Bush v. Steinman,
1 Bos. & Pull.
404.

on

See also Let-
teldale v.
Ld. Londale,
ib. and
2 H. Black.
267. 299.
Harman v.
Tappenden and
15 others,
1 East, 555.

on the road, whereby an accident happened; and on an action being brought against the owner of the house, it was held to be well brought, and that he was answerable.

6. "So no action will lie against individuals for acts done in a corporate capacity, unless there is proof of express malice."

As where the action was against the several defendants being the officers and freemen of the company of free fishermen and dredger men of Feverham, by the plaintiff who had been one of the body and removed by them, and afterwards restored by the Court of King's Bench, to recover damages for the loss of profits during the time of his amotion. The action was adjudged not to lie.

2. OF THE PARTICULAR INJURIES FOR WHICH THIS ACTION LIES,

These are divisible into injuries, 1. To the person: 2. To personal property: 3. To real property, or chattels real: 4. To personal rights, not properly reducible to any particular head,

Of each of which in their order.

1. OF INJURIES TO THE PERSON.

1 Danv. 77.
Dr. Groenvelt's
case,
2 Ld. Raym.
214.

1. If a person undertakes the cure of any wound or disease, and by neglect or ignorance the party is not cured, or suffers materially in his health, he may recover damages in this action; but the person must be a common surgeon, or one who makes public profession of such business, as surgeon, apothecary, &c. for otherwise it was the plaintiff's own folly to trust to an unskilful person, unless such person expressly undertook the cure.

"And it seems that any deviation from the established mode of practice, shall be deemed sufficient to charge the surgeon, &c. in case of any injury arising to the patient."

Slater v. Baker
& Stapleton,
2 Will. 359.

For upon this ground an action was adjudged to lie against the surgeon and apothecary, for breaking the callous of the plaintiff's leg after it had been set: it appearing that it was done unskilfully and out of the common course of practice, and for the sake of making an experiment with a new instrument.

1 Roll. Ab. 90.

2. "If the health of any person is impaired in consequence of the act of another, as selling him bad wine, which injures the party's health, this action will lie; so for exercising a noisome trade in the neighbourhood, which produces the same bad effects."

Jones v. Powell,
Hutt. 135.
Morley v.
Pragnell,
Cao. Car. 519.

As where the action was brought for erecting a brewhouse and burning sea-coal, by which the air was infected: so for erecting tallow-furnace, to the annoyance by the smell of the plaintiff's house and family, and loss of business in consequence; in these cases the plaintiff had redress by action on the case,

3. "

3. "If any person keeps a dog *which is used to bite*, this action will lie against the owner, at the suit of any person whom the dog has bitten."

But the owner must have notice that the dog was used to bite; for though if a man keeps animals *feræ naturæ*, as lions or bears at large, without proper care, he is answerable for any mischief they do, though without notice, yet dogs being *mansuetæ naturæ*, the owner must have notice of their viciousness, or he will not be liable: and it is therefore matter of substance to set out the notice in the declaration.

Mason v. Keeling,
1 Ld. Raym. 606.
Buxenden v. Sharp,
2 Salk. 662.

Therefore where a dog had once bitten a man, and the owner still let him go at large, though he had notice of the dog's having bitten the person, and he afterwards bit another person, this action was adjudged to lie against the owner of the dog, though it appeared that the person who had received the injury had trod on the dog's toes; for the owner should have hanged him on the first notice, and the king's subjects are not to be endangered.

Smith v. Pelah,
2 Stt. 1264.

"But where the injury from any animal arises from the plaintiff's own misconduct and want of care, the action will not lie against the master."

As where in an action for keeping a dog used to bite, it appeared that the defendant, who was a carpenter, had kept a dog for the protection of his yard, who was kept chained up all day, and let loose at night: and it also appeared that the plaintiff had gone into the yard at night after it had been shut up, and the dog loose, and had then received the injury: Lord Kenyon ruled that every man had a right to keep a dog for the protection of his property; and that the injury here having arisen from the plaintiff's own fault, in going into the yard after the dog had been properly let loose, the action would not lie.

Brook v. Copeland,
Esp. N. P. Cal. 203.

"But where there is either a public way, or the owner of a mischievous animal suffers a way over his close to be used as a public one, if he keeps such an animal in his close, he is liable for any injury any person may sustain from such animal."

As where in an action for keeping a mischievous bull that had hurt the plaintiff, it appeared that the plaintiff was going over a field of defendant's in which the bull was kept, and where he had received the injury, it was contended, that the plaintiff having gone there of his own head could not maintain the action; but it also appearing that there was a contest concerning a right of way over this field wherein the bull was kept, and that defendant had permitted several persons to go over it as an open way, it was decided, that plaintiff having gone into the field supposing he had a right to go there, and defendant having permitted it to be used as a legal way, that he should not be permitted to set up in his defence the right of keeping such an animal there as in his own close, and that the action was maintainable.

A case cited by
Ld. Kenyon in
Brock v. Copeland,
supra.

So an action will lie against the owner of a dog used to bite sheep, for killing any, after notice to the master.

Bolton v. Banks,
Cro. Car. 254.

And it is sufficient to support the *scienter* in this action, that the dog had once done so before.

Kinnion v. Davis,
Cro. Car. 427.

And

TRESPASS ON THE CASE.

Jenkins v.
Turner,
1 Ld. Raym.
118.

And if one has a dog used to bite sheep, and he bites an horse, it is actionable; for the owner after notice of the first mischief done, should have destroyed the dog, to prevent further injury.

But these latter cases more properly belong to the head of Injuries to Personal Property.

2. OF INJURIES TO PERSONAL PROPERTY.

Under this head I shall consider, 1. Such injuries as arise to personal property, from the misconduct or negligence of officers: 2d, Of private persons.

Under the class of officers I include, 1. Sheriffs, and their inferior officers: 2. Attornies: 3. Justices of the peace.

1. OF INJURIES BY SHERIFFS, OR THEIR INFERIOR OFFICERS.

Under this head it is previously to be observed,

1. "That as the office of sheriff partakes of a *judicial* as well as a *ministerial* function, wherever the sheriff is acting in his *judicial capacity*, no action will lie for any misconduct in it, where no fraud or corruption appears."

Metcalf v.
Hodgson et al.
Hutt. 120.

As where the plaintiff declared against the defendants as sheriffs of York, that time out of mind there had been a court of record held before the sheriffs, where actions of debt had used to be brought, and the defendants in such actions arrested, and held to bail by the said sheriffs, and that the sheriffs were also from time immemorial keepers of the gaol; and the action was against the sheriffs for taking insufficient bail; the Court held, that the two authorities concurring, they would hold the act to be done by them as judges, and that the action would not lie.

Watson v. Ben-
nison & Elwick,
Cro. Eliz. 625.

2. If there are two sheriffs, and an action is brought against them for any misconduct in their office, and one of them dies before the trial; yet shall the action survive against the other as in other actions of trespass, the *tort* being several as well as joint.

Salk. 18.

3. "Where a *tort* has been committed by any officer of the sheriff, the party injured may have his action *either* against the sheriff or against the officer (as in the case of a voluntary escape) but where the injury is caused by a *neglect or breach of duty* in any of the officers of the sheriff, the action must be brought against the sheriff himself."

Marth v. Astry,
Cro. Eliz. 175.

As where the action was against the under-sheriff for *embezzling a writ*, this being a *tort*, was adjudged to lie against the under-sheriff.

Cameron v.
Reynolds,
Cowp. 403.

But where it was against the under-sheriff for *not executing a bill of sale to a nominee of the plaintiff's*, of certain goods taken in execution, in pursuance of a promise; this action was held not to lie it should have been brought against the sheriff as a breach of duty of office; but in fact, the under-sheriff is not bound to make such bill of sale, the legal mode being by writ of *venditioni exponas*. therefore the action would lie in no case.

Th

TRESPASS ON THE CASE.

111

The principal cases in which this action lies against the sheriff or his officers, may be reduced to four heads.

1. That of escapes: 2. That of rescues: 3. Of improper or informal executions: 4. Of false returns.

And 1st, Of Escapes.

Under this head, I shall consider, 1. What shall be deemed a legal arrest, so as to subject the sheriff and his officers; for unless the arrest is legal, this action will not lie: 2. What shall be deemed an escape: 3. In what cases, and how far the sheriffs shall be liable: 4. What shall excuse him, and how he may have redress.

1. What shall be deemed a legal Arrest.

1. *Bare words* will not make an arrest; there must be an *actual touching of the body*, or, what is *tantamount*, a power of taking immediate possession of the body, and the party's submission thereto: and therefore in this case where the bailiff said to the defendant against whom he had the writ, he being then at some distance, that he arrested him by a warrant he had against him; and the defendant having a fork in his hand, kept the bailiff at a distance till he retreated into the house, it was held to be no arrest.

Gemmer v. Sparks,
1 Salk. 79.

But where a bailiff having a writ against a person, met him on horseback, and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him; but if on the bailiff's saying those words he had fled, it had been no arrest, unless the bailiff had laid hold of him.

Horne v. Battyn,
Hil. 12 G. 2.
B. R.
Bull. N. P. 62.

2. The arrest must be *by authority of the bailiff, to whom the warrant is directed*; that is, he must be in company, but he need not be the hand that arrests, nor present, nor in the sight of the party arrested: as here where he sent his follower forward, who made the arrest, he being at some distance, and out of sight, the arrest was held to be good.

Blatch v. Archer,
Cowp. 64.

3. The arrest by the bailiff must be *by virtue of a warrant signed and sealed by the sheriff*; a verbal authority is not sufficient.

S. C. 1811.

4. The bailiff when he makes the arrest need *not show his warrant*, nor tell at whose suit the writ is, unless the party demands it: and if the bailiff has two warrants in his pocket, and produces neither, if the prisoner be rescued, either party at whose suit the warrants were, may bring his action and recover.

Hodges v. Marks,
Cro. Jac. 485.

5. It is not lawful *to break open doors* to make an arrest in any case of civil process, for the law will not allow such breach of the peace.

Semaine's case,
5 Co. 92.

Therefore where bailiffs rapt at a door, and on its being opened to see who was there, rushed forcibly in with their swords drawn, the entry and arrest were held to be unlawful.

Park v. Evans,
Hob. 62.

But if the bailiff *finds the outer door open*, and enters peaceably, he may *break open the inner doors* to make an arrest; and this was held so in the present case; where the defendant was a *lodger*, whose room it was contended was his dwelling-house.

Lee v. Ganfel,
Cowp. 1.

So

Marwell v. King. Reading
Lent A.D. 1766.
M.S.

So where the outer door was a *hatch-door*, the upper part of which was open, but the lower bolted at top and bottom, the officer unbolted the top; and not being able to reach the bottom, *leapt over it*, and unbolted it, and let in the others: it was ruled by Just. *Wilmot*, that this entry was lawful.

Hopkins v. Nightingale et al. Eip. M. P.
Cal. 99.

But where in action for breaking and entering plaintiff's house it appeared that the plaintiff's house stood in a stable-yard which was surrounded by a wall, there was a hatch-gate which stood at the foot of the stairs which led to an open gallery from whence there were doors to several apartments, at the top of the stairs there was a door across that part of the gallery which led to the chamber where the plaintiff was; the defendants having got into the yard, broke open the door at the top of the stairs and arrested the plaintiff. Lord *Kerwin* held, that this was the outer door of the plaintiff's dwelling, and that the arrest was illegal.

Howson v. Walker.
2 Black. Rep.
813.

But though a person has been illegally arrested, as here by the bailiff's breaking into the house, yet *if while in such illegal custody he is fairly charged with another arrest*, such last arrest shall be good: but there must be no fraud or collusion, first to arrest the party unlawfully, and then charge him with another action.

6. "By stat. 29 Car. 2. c. 7. § 6. no arrest shall be made on a *Sunday*, except in case of treason, felony, or breach of the peace."

Wilson v. Tucker,
Salk. 72.

An arrest on this day is therefore absolutely void, inasmuch that the party arrested may maintain an action of false imprisonment in consequence of it.

Parker v. Sir Wm. Moor,
Salk. 616.

1. But a person may be *retaken on a Sunday* by virtue of a escape-warrant. This is now enacted by statute 5 Ann. c. 9.

2. The bail may take their principal on a *Sunday*, and surrender him the next day.

Rex v. Myers,
1 T. Rep. 265.

3. But a conviction on a statute, and an order of commitment to the house of correction, the party having no goods, is not criminal proceeding within the statute to allow an arrest on *Sunday*; but such is void.

Devenage v. Dalby,
Doug. 369.

The writ to arrest should be within the proper county; if where a person was arrested by a bill of *Middlesex* in another county, the proceedings were set aside for irregularity.

Frost's case,
5 Co. 89.

8. If a person is in custody of the sheriff for one cause *delivering to him a writ against the same person for another cause*, a good arrest; as here, where he was in on a *ca. ad. resp.* delivering a *cap. utlag.* was held good, and to subject the sheriff on escape.

2. What shall be deemed an Escape.

1. "Imprisonment making part of the debtor's punishment against whom a judgment was had, and who could not pay, after the defendant had been committed to prison on a *capias* *satisfaciendum* he was seen at large, it was at all times deemed an escape in the sheriff."

For where in debt against the sheriff of *Bucks* for an escape, the escape assigned was, that a person in prison at the suit of the plaintiff was suffered to walk at large through the town, though attended by a keeper, it was adjudged such an escape as subjected the sheriff; and the plaintiff had judgment.

Balden v. Temple,
Hob. 202.

And the action will equally lie although the party has never been in prison, but remained in custody of the officer.

Benton v. Sutton,
1 Bos. & Pul.

2. "But to persons taken on *mesne process* only, the sheriff might shew them what indulgence he pleased, provided he had them forthcoming at the return of the writ."

24-
3 Black. Comm.
415.

But that is now altered in the case of the warden of the *Fleet*, and the marshal of *K. B.* by stat. 8 & 9 *W. 3. c. 27.* which enacts, "That the warden of the *Fleet*, or marshal of the *King's Bench* prison, suffering any person committed on *mesne process* or execution to go at large, except on *habeas corpus* or rule of court, shall be deemed an escape."

So that still in other cases the officer may permit the person arrested to go at large, provided he has him at the return of the writ; but in the case of final process, he cannot for a minute.

Per Ashhurst, J.
Atkinson v. Mattinson,
2 T. Rep. 172.

"If the sheriff has arrested a defendant on *mesne process*, it should seem that he is not obliged to carry him to prison when the return of the writ is out, if the plaintiff is not delayed in his suit."

For where the writ was returnable in the eight days of the Purification, under which the defendant was arrested, but he was not carried to prison till the day before the eschoign day of *Easter* term, when the plaintiff declared against him; it was held, that the sheriff was not liable to an action as for an escape, the jury having found that the plaintiff was not delayed in his suit.

Planch v. Anderson et al.
Sheriff of London,
5 T. Rep. 37.

So although the sheriff may have permitted the defendant to go at large without taking a bail bond; yet, if before the expiration of the rule to bring in the body, bail above be put in, the sheriff is not liable to an action for an escape or for the return.

Pariente v. Plumbtree,
2 Bos. & Pull.
35.

But if the sheriff omit to take a bail bond, and bail above be not put in and in due time, the Court will not permit the sheriff to put in and justify bail to save himself, if the plaintiff in the action opposes it; and in such case the sheriff will be liable to an action for an escape.

Fuller v. Prest,
7 T. Rep. 109.

But if the plaintiff has neglected to oppose the justification of bail, and they have been permitted to justify, the rule for the allowance of bail when produced is an answer to an action for an escape.

Murray v. Durand,
1 Esp. Rep. 87.

3. By the same statute it is further enacted, "That if the marshal or keeper of any prison shall, after one day's notice in writing, refuse to shew any prisoner in execution to the creditor at whose suit such prisoner was charged, or to his attorney, such refusal shall be deemed an escape."

4. "Where a new sheriff is appointed, his predecessor in office should hand over to him all the prisoners in his custody with their respective executions; and if he omit any, it is an escape, and this should be done by indenture."

3 Co. 71.

Civ. El. 366.

Vol. II.

I

For

Westby's case,
3 Co. 71.

For where the prisoner for whose escape this action was brought had been in the custody of the former sheriffs, *at the suit of the plaintiff, and also of one Dighton*, and in the indenture containing the names, &c. of the prisoners, *the execution of the suit of Dighton only was mentioned*; and the prisoner escaped; it was adjudged that the former sheriffs were liable for the escape as to the plaintiff's execution; for being delivered over for one cause, he was out of execution for the other, and so it was an escape immediately in the old sheriffs.

S. C. Ibid.

And if the former sheriff dies, the successor must at his perils take notice of all the persons in custody, and their respective executions; but till a new sheriff is appointed, the under-sheriff is to take charge of the prison, and is made liable by statute 3 Geo. 1. c. 15. But in such case the assignment by the under-sheriff need not be by indenture.

"But in no case shall the sheriff be liable, except the person who has escaped has been in actual custody; that is, unless *legally arrested by his own officers*, handed over to him *in the gaol* by the former sheriff, or *regularly delivered into custody*."

And, 1st, "He must have been *legally arrested by the sheriff's own officers*."

De Moranda v.
Dunkin,
4 T. Rep. 120.

For where the plaintiff, having taken out a *capias ad satisfaciendum* against the defendants, sent it to *Painter*, his agent in *Cornwall*, he applied to the sheriff for a warrant, directed to *Painter's own clerk*, assigning as a reason for not applying to the under-sheriff, that the under-sheriff was attorney for one of the defendants; the sheriff after some objection, granted a warrant to *Rogers, Painter's clerk*, who arrested, and suffered the defendant to escape; it was held, that the sheriff was not liable in this case, nor in any case where a special bailiff is appointed on the nomination of the plaintiff himself; for he must take the consequence of all his acts, particularly as by such means the sheriff might be charged either by their fraud or neglect.

Drawbridge-
court's case,
Cro. Eliz. 366.

2. "Or he must be handed over in gaol by the former sheriff. For where the old sheriff had a person in custody in a *private house*, and would there have assigned him over to the new sheriff who refused to accept him, and the prisoner escaped, it was adjudged to be an escape in the old sheriffs, but not in the new for the prisoners can only be assigned in the common gaol.

3. "Or he must be regularly delivered into custody, in order to subject the officer to an escape."

Watson v. Sutton,
Salk. 27.

For where the prisoner was out on bail, and came and surrendered himself in discharge of his bail, by entering a *redditis* in the judge's book, the plaintiff's attorney accepted him in execution, and filed a *committitur* with the officer, and afterwards the prisoner escaped: this action was held not to lie against the marshal, for he was *not chargeable without notice*, which should be done either by serving him with a rule or entering a *committitur* also in his book.

5. Whe

5. Where the bailiff of a liberty, having return of writs and execution on them, brings a prisoner taken in execution out of his liberty to lodge him in the county gaol, it is an escape, and shall subject the bailiff.

Boothman v.
Lord Surry,
2 T. Rep. 5.
Boyton's case,
3 Co. 42.

6. Where the sheriff appointed a prisoner turnkey of the prison, it was held to be a voluntary escape.

Wilkinson v.
Salter & al.
Caf. temp.
Hard. 311.

3. In what Cases and how far the Sheriff is liable.

1. By stat. 8 & 9 W. 3. c. 27. s. 9. "If any person, desiring to charge another with any action or execution, shall desire to be informed by the keeper of any prison, whether such person is a prisoner there or not, the keeper shall give a true note in writing to such person or his attorney, under the penalty of 50*l.*; and such note, acknowledging the person to be there, shall be sufficient evidence that such person is in actual custody."

When a person is acknowledged to be in actual custody, delivering a writ to the sheriff against such person is an arrest in law, and will subject the sheriff or officer in case of an escape.

Jackson v.
Humphrys,
Salk. 274.

2. "The sheriff is only answerable for an escape from himself, or from some of his officers."

For where a *ca. sa.* was awarded by the sheriff of Berks to take the body of J. S. who was then in custody of the mayor and burgeses of Windsor, and it being a liberty, he made his mandate out, directed to them as bailiffs of the liberty; afterwards J. S. escaped, and the action was adjudged to lie not against the sheriff, but against the mayor, &c., they not being officers of his.

Mayor and Bur-
geses of Wind-
sor's case,
Cro. Eliz. 26.
Ante, fol. 607.
S. P.

3. If the defendant is in custody of the sheriff, taken under a *copias utlag. on an outlawry* on mesne process, yet if the sheriff suffers him to escape, this action will lie: for though in fact the party is in custody at the suit of the king, and the plaintiff has no interest in his body, yet as the outlawry will not be reversed without security given to appear to a new original, his escape is an injury to the plaintiff; and so the action lies.

Bonner v.
Stokely.
Cro. Eliz. 652.
Cook qui tam
v. Champneys,
2 Stra. 901.
Sercole v.
Hanson,
1 Will. 3.

4. "A distinction is to be observed between process which is void, and which is erroneous."

"For where the process is void, no action will lie against the sheriff for an escape; but it will, where the process has been erroneous, or irregular only."

The sheriff in this case had the defendant in custody on a *ca. sa.* which had issued after the year and day without a *scire facias*, and the defendant escaped. In an action for the escape, the sheriff was held to be liable, and that he could not take advantage as a defence, of the irregularity in suing out the process; but it had been otherwise had the arrest been made on a *cap. ad respond.* tested of Trinity, and returnable the Hilary term following; for such process must be returnable from term to term, or it is out of court.

Shirley v.
Wright,
Salk. 273.
Bushe's case,
Cro. Eliz. 188.
S. P.

So where the arrest is founded on a void judgment, the plaintiff cannot recover against the sheriff for an escape; but it is otherwise where the judgment is only erroneous.

Gold v. Strode,
Carth. 148.

Ibid.

" And wherever the Court which gives the judgment has jurisdiction, the judgment may be erroneous, but is not void; but if the Court has no jurisdiction, the judgment is void."

Anon,
March 8.

Therefore where a *ca. sa.* was executed on a judgment of an inferior court, in debt on a bond made *extra jurisdictionem*, and the defendant had escaped, the Court held that an action would not lie against the sheriff.

And the reason why the sheriff is charged in one case and not in the other is, *that though the process is erroneous, yet the sheriff may justify under it in an action for false imprisonment; and as he may therefore protect himself by such means, he shall be charged.*

Coniers Sheriff
of Durham's
case,
Cro. Eliz. 576.
Weaver v.
Clifford,
Cro. Jac. 31.

Therefore on a recognizance in chancery, conusee having sued execution by *ca. sa.* under which conusor was arrested and escaped, it was adjudged, That though the *ca. sa.* was erroneously awarded, yet that while it continued unreversed it was a good execution for the party, and the sheriff was liable.

2. How far the Sheriff is liable.

Br. Ab. 19.
2 Inst. 382.
Fetty v. North,
Cro. Eliz. 17.
2 Stra. 873.

Trespass on the case lies in cases of escapes on *mesne process* in which the debt or damages not being ascertained, the plaintiff recovers in this action *damages* for losing the benefit of his action, which are uncertain; but where the party has been in custody *in execution*, wherein the debt and damages are liquidated there, under the stat. *West. 2.* and *1 Rich. c. 12.* the whole are recoverable *in an action of debt*, with this exception, that where the plaintiff had execution on a statute of lands, goods, and body, and the prisoner escaped, as the lands remained in execution, debt would not lie, but trespass on the case.

" In escapes, therefore, on *mesne process* the matter turns on whether in fact the plaintiff has been delayed in his suit or not or suffered any injury from it: for if he has not, and it is found by the jury, no action whatever will lie."

Planch v. Ander-
son,
2 T. Rep. 37.

As in this case, *ante*, where the defendant was arrested on *mesne process*, but kept in custody after the return of the writ, and then carried to prison; and the jury found, that the plaintiff was not thereby prejudiced or delayed in his action. It was resolved that the plaintiff had no cause of action.

Bonefous v.
Walker,
2 T. Rep. 126.
1 Ref.

And if the party proceeds by action of debt against the sheriff or gaoler for an escape, the jury *cannot give a less sum than the creditor would have recovered against the prisoner*; that is, the sum indorsed on the writ, and the legal fees of execution.

Reading v.
Edwin and Fleet,
Carth. 145.

And note, That if the party escapes out of one of the counters the action shall be brought against both sheriffs; not against him only from whose counter the escape was made, for the two persons make but one sheriff.

In point of practice in this case, if there has been no misconduct in the sheriff, or if the defendant who escaped was insolvent

olvent, so that although he had not escaped, the party would have had no fruit from his action, the damages are generally nominal.

4. What shall excuse the Sheriff, and how he shall have Redrefs.

1. "The first case I shall consider in which the sheriff shall be excused for an escape, is the case of *rescous*."

If the sheriff arrests a person on *mesne process*, and he is rescued in going to gaol, the sheriff is not liable; for as the sheriff if he meets the party against whom he has such process, is bound to arrest him, if pointed out to him, and so he cannot be supposed to have the *posse comitatus* then with him: in all cases of *mesne process*, on the same principle, in cases of rescue he shall be excused.

May v. Proby,
Cro. Jac. 419.

Sir William
Clarke's case,
Cro. Eliz. 873.

But if such person be once within the walls of the prison after such arrest on *mesne process*, the sheriff shall in all cases be liable, except where the rescue is by the king's enemies, or the escape by reason of fire: but if a party of rebels or traitors breaks the prison and lets the prisoners at large, the sheriff is liable on this ground, that he may always command the *posse comitatus*, and no power shall be presumed greater than that, except common enemies; besides, he may have remedy against traitors or rebels by law, but not against common enemies.

1 Roll. Ab. 808.
Southcote's case,
4 Co. 84. a.
1 Roll. ibid.

Year B. 33.
H. 6. 1.
Elliott v. Duke
of Norfolk,
4 T. Rep. 789.

And the law is the same in the case of arrests on final process.

1 Roll. Abr. 808.

"For wherever the sheriff has time to prepare the *posse comitatus*, he shall be liable in case of a rescue."

Therefore where the sheriff was ordered to bring up the body in custody on *mesne process*, by *habeas corpus*, and defendant was rescued in going to court, the sheriff was held to be liable; for the sheriff having had notice when the body was to be brought up, he might have provided against a rescue by assembling the *posse comitatus*.

Crompton v.
Ward,
2 Stra. 482.

"And in the case of a rescue, the party at whose suit the arrest was made may maintain his action either against the sheriff or against the rescuers. If, therefore, he elects to proceed against the rescuers, it should seem that the sheriff was discharged."

Mynn v.
Coughton,
Cro. Car. 109.
Congham's case,
Hutt. 98.

2. "A second ground of excuse for the sheriff, in case of an escape, is a *recaption upon a fresh suit*."

But 1st. In the case of *voluntary escapes*, the gaoler cannot retake the prisoner; but the plaintiff may by an escape-warrant, and proceed against him to judgment, or against the gaoler. This is in the case of *mesne process*.

5 Co. 52 b.
Per Wilmet,
C. J.
2 Will. 295.

But if the party so suffered to escape was in execution, the plaintiff may retake him after the twelvemonth without a *scire facias*, for he is on the first execution.

Lenthall v.
Gardiner,
Hil. 26 Car. 2.
Bull. N. P. 69.

And this though the plaintiff had recovered in an action against the gaoler, if the sum recovered was less than the debt.

Collop v.
Brandley,
Trin. 31.
Car. 2.

But
Bull. N. P. 6

Willing v. Goad,
2 Stra. 908.

But in the case of *negligent escapes*, the gaoler may at any time retake the prisoner; though if the defendant escapes out of prison, and the plaintiff sends a discharge while he is so at large, the gaoler cannot justify *retaking him for his fees*.

Ridgeway's
case,
3 Co. 52.

2. The prisoner must be taken on *fresh suit* to excuse the sheriff; and though *he may have been out of sight*, (as in this case, for a day and a night,) yet may the recaption be deemed fresh suit, and the sheriff be excused; and though the prisoner might have fled into another county, yet may the sheriff there retake him on a fresh suit.

Whiting vs
Sir J. Keynell,
Cro. Eliz. 657.
Stonehouse v.
Mullins,
2 Stra. 873.

But the recaption must be before action brought, or it shall not be deemed fresh suit; for where it appeared that the recaption was not till after the action had been commenced, the marshal was held to be liable for the escape from his prison.

Ball v. Briggs,
1 Jones, 145.

And in this case the recaption was on the *same day* of commencing the action, and the officer was held not to be discharged, the right of action being attached in the plaintiff.

Chambers v.
Gambier,
Com. Rep. 554.
2 T. Rep. 126.

So if the escape was involuntary, and the party returns of himself before action brought, and is in prison, it shall excuse the officer; for it is tantamount to a recaption on fresh suit.

Vaſt v. Gaudy,
Cro. Eliz. 5.

3. "In general, to charge the sheriff or his officers with an escape, it must have proceeded either from connivance, from neglect, or want of due care, and therefore in all cases where the sheriff or his officers are acting under proper authority, and an escape happens, he is excused."

Therefore where in an action for an escape against the marshal, he gave in evidence that the person in prison had been *let out to bail by order of the Court*, to prosecute the attain; it was held a good justification; for it was not done out of his own head but by command of the justices.

Bonafous v.
Walker,
2 T. Rep. 126.

An escape of a prisoner in the custody of the marshal, *from the rules of the King's Bench prison*, is a negligent and not a voluntary escape; for by stat. 8 & 9 W. 3. c. 27., the marshal has a right to permit a prisoner to go within the rules.

4. "As in the case of voluntary escapes, the action lies *against the officer permitting it*, the sheriff seems thereby to be discharged if the party proceeds against the officer."

Ravenscroft v.
Eyles,
2 Will. 294.

And wherever the gaoler suffers a voluntary escape, from that moment he is a wrong-doer, and though the *original defendant returns, and the plaintiff proceeds against him to judgment* after his return, yet it is no waiver of the action against the gaoler; but he may still be sued for damages.

5. "And in the case of a voluntary escape, no subsequent assent of the plaintiff in the action shall purge it."

Scott v. Peacock,
Salk. 271.

For where to a *sci. fa. quare executio non*, &c. upon a judgment, the defendant pleaded, that he had formerly been taken in execution on a *ca. sa.* upon the same judgment, and by the sheriff suffered to escape, *to which escape the plaintiff consented*; it was held no plea, for the subsequent assent could not make it an escape with the consent of the plaintiff; but that he may either sue the sheriff or retake the party.

3. "A third ground of exemption from liability on account of escapes is where the prisoner has been permitted to go at large on a day-rule, and has been seen at large at a time not protected by such rule, which would be an escape."

With respect to day-rules, they are granted in pursuance of stat. 8 and 9 W. 3. c. 27. § 1. A petition is presented to the chief justice and judges of the Court, signed by the several prisoners who want day-rules, stating that they have occasion to treat with their creditors, &c.; and praying leave to go out of prison for that day, for the purposes aforesaid, and to return again the same day. Upon this a rule of Court is given, entitled as of the day prayed, and leave given accordingly.

And where such a rule was given on the first day of term, and the prisoner had been seen at large on the morning of that day, before the Court sat, and it was contended that no petition could be presented, nor rule granted, till the Court sat, so that the prisoner was out without authority, the Court held that the rule when granted, had relation back, and legalized the absence of the prisoner for the day. *Field v. Jones* 9 East, 131.

2. How far the Sheriff shall have Redress,

1. If the party in custody, on execution or otherwise, escapes, the sheriff may have an action of trespass on the case against him, for the sheriff is liable over to the plaintiff in the first action. *Sulston and Offley v. Paine*, Cro. Eliz. 234.

So in an action against a prisoner for an escape, Just. Yates ruled, That if a sheriff voluntarily permits a prisoner to escape, and he in consequence is obliged to pay the debt, he may maintain an action for money paid, laid out, and expended against the defendant, for he is discharged as against the plaintiff in the action; and he said that the same point had been so ruled by himself and Just. Gould on the western circuit. *Morris v. Berkeley*, Worcester Leet Ass. 2765. MSS.

And this action is maintainable by the sheriff against the person escaping, though he himself has not been sued on the escape: For the party arrested did a wrong by the escape, and the sheriff is always liable to the plaintiff in the original action: and perhaps the person escaping might die, or leave the country before the sheriff was sued, and so he would lose his remedy. *Sheriffs of Norwich v. Bradshaw*, Cro. Eliz. 53.

2. But the bailiff who made the arrest, and from whom an escape has been made, cannot have case against the person escaping, even though the sheriff has recovered against him; for he is not chargeable to the sheriff by law, but upon his own undertaking; and therefore as no responsibility is by law annexed to his office, the law gives him no remedy, as the wrong was not done to him but to the sheriff. *Atherton v. Harward*, Cro. Eliz. 349.

Having considered the cases of escapes and rescue, I shall now consider those on improper and informal executions.

3. Of Improper or Informal Executions,

1. By statute 8 Ann. c. 14. § 1. "No goods or chattels w^hever, lying or being on any premises leased for life, years at will, shall be liable to be taken in execution, unless the p^r at whose suit the execution or extent is sued out, before removal of the goods, shall pay to the landlord or his bailif such sums of money as are or shall be due for the rent of said premises at the time of the taking in execution, provi^d the arrears do not amount to one year's rent; and in case amount exceed one year's rent, then the party at whose suit execution is, paying the landlord or his bailiff one year's r^e may proceed in the execution, and the sheriff or other off^{ic} is empowered to levy the money so paid for rent as well as execution, and pay it over to the plaintiff."

Palgrave v.
Windham,
1 Stra. 212.
2 Will. 141.

If therefore the sheriff takes goods in execution, and removes them off the premises before the landlord has been satisfied the year's rent, (*he having got notice* that the rent was due) action on the case lies against him, either at the suit of the landlord himself, or, in case he is dead, of his executor or administrator, it being an injury to the estate.

But these decisions are to be observed :

S. C. *ibid*.

1. That the payment must be made by the plaintiff in action; and the sheriff should not proceed in the execution till rent is paid; for so are the words of the statute.

Gore v. Goston,
1 Str. 643.

2. The landlord must be paid *his whole year's rent*; that without deduction of poundage for sheriff's fees.

3. "The statute extends only to the case of *the immediate* of the defendant."

Case of James
Bennett, Eq.
2 Str. 787.

For where the lessee had under-let, and the under-lessee's goods were taken in execution, the Court held, that the landlord (that is, the first lessor) had no claim under the statute for one year's rent, as against the estate of the *under-lessee*, but it was confined only to his lessor, who was the original lessee.

Henchett v.
Kempson,
2 Will. 140.

4. "The statute extends to all cases of execution by *fi. fa.*"

For where the *defendant* had judgment as in case of a non assumpsit, and took out a *fi. fa.* for his costs, it was adjudged, that the landlord should be paid his rent before the execution was served, though it was contested, that the statute only extended to cases of executions taken out by the plaintiff.

Waring v.
Dewberry,
1 Stra. 94.

5. "But the sheriff must in all cases have notice of the being in arrear, or he is not liable after he has levied the money."

For where the lessee was in arrear of rent, and the lessor and before administration granted a *fi. fa.* issued, and was executed by the sheriff on the goods of the lessee; and after administration was granted, it was adjudged, that as there was no one to whom payment of the rent could be made when the execution was levied, and the sheriff was not obliged to return the writ to the administrator without remedy, and particularly as notice of rent-arrear ought to come from the landlord.

But in these cases, if the sheriff has levied the goods, the landlord may avoid an action, by getting a rule of court on the sheriff to pay him out of the money levied. 2 Will. 141.

2. "Another case in which the sheriff is liable to an action "under this head is this:"

If two writs of the same *teste* came to the hands of the sheriff, he should by common law execute that first which is first delivered, the goods being bound from the *teste*. But by the statute of frauds, the goods are bound from the day of delivery, and so priority of delivery is an advantage. Therefore now, whatever be the *teste*, the first delivered ought to have the priority of execution: and therefore, if two writs of *feri facias* both come to the sheriff on the same day, that which is first delivered must be first executed. If therefore the sheriff executes the last delivered *fi. fa.* first, it is an injury to the plaintiff in the first *fi. fa.* and he may have this action of trespass on the case against the sheriff; but the execution of the second *fi. fa.* is good.

Smallcombe v.
Buckingham,
Salk. 320.

"But in order to charge the sheriff, the first execution must "be *bona fide*."

For where in an action against the sheriff, the case was that a *fi. fa.* had issued directed to the defendant at the suit of the plaintiff, against one *Crop*; one *Whitehall* was made special bailiff, and the warrant was made out to him and two others. *Swanton*, the plaintiff's attorney, was present at the execution of it, and said to *Whitehall* to use *Crop* kindly, and not to take his household goods, for that his landlord, one *Earl*, would soon be in the country, and would pay the debts: upon this the bailiff rode round the land, and said "I seize all this corn and cattle;" and took some account thereof for the use of the plaintiff. This *fi. fa.* was tested the 11th of May, and executed the 14th in the manner mentioned. On the 20th of May, *Earl*, *Crop*'s landlord, to whom he was indebted upon a judgment, sued out a *fi. fa.* against him; and the sheriff's bailiffs not being in possession of *Crop*'s goods, nor having left any body there, *Earl* got his execution executed, and there was no proof that *Earl* promised to pay the plaintiff: in an action against the sheriff, it was decided, that it was proper evidence to be left to the jury, Whether the first execution that came into *Crop*'s house was intended to be, or really was executed, and not fraudulent? The jury having found it to be so, the defendant had judgment.

Bradley v.
Winham,
1 Will. 44.

3. But where two writs come to the sheriff, if he executes the last delivered first, and levies under it, such sale shall be good as well to the vendee, who shall hold the goods, as to the plaintiff in that writ who shall not be liable to refund the money levied; but the sheriff shall be liable to the plaintiff in the first execution, who had lost the benefit of his execution against the defendant.

Rybot v.
Peckham,
Mich. 19 Geo. 3.
quot. 1 T.R. 731.

But where two writs are so delivered, if the sheriff has seized under the second writ, but not actually sold; or if he permits the plaintiff under the second execution to sell, but with a reservation of the first execution, in such case the plaintiff under the second execution

Hutchinson v.
Johnston,
2 T. Rep. 729.

execution is not entitled to hold the money levied against the plaintiff in the first.

The last class of injuries for which this action lies against the sheriff or other officers, is that of

4. False Returns.

Griffith v.
Walker,
1 Wils. 336.

1. As where a sheriff returned "*scire feci*" to a *scire facias*, when in fact he had given no notice, this action was adjudged to lie: and that it might be laid in the county where the return was made, and not confined to the sheriff's own county.

Powell v. Hord.
1 Stra. 650.

So where the sheriff made a false return of *non est inventus* to a writ of mesne process.

Hawkins v.
Mildmay,
Cro. Eliz. 729.

So where the sheriff had directed his warrant to the bailiff of a liberty to arrest the party, he made the arrest, and yet the sheriff returned *non est inventus*, and this action was adjudged to lie.

"But where a sheriff is called on to return a writ in which the property of the goods may come in question, he may inquire how the property is circumstanced, and make his return accordingly."

Crosley v. Ark-
wright,
2 T. Rep. 603.

For where in an action against the defendant, the sheriff of *Derbyshire*, for a false return, the case was, That a writ of *fi. fa.* issued against the goods of one *Clarke*, certain goods were seized which appeared to be the property of *Clarke*; but it appeared that he claimed them under deed of assignment from one *Allanfon* who being indebted to *Clarke* in 400*l.* in consideration of 20*l.* more advanced, and of an annuity of 25*l.* *per ann.* for his life *Allanfon* had assigned all the goods in question to *Clarke*; but *this annuity-deed had never been registered*, and therefore was void under stat. 17 Geo. 3. c. 26. the sheriff had returned *nulla bona*: it was adjudged, that the deed being void for want of being registered that *Clarke had no property under the assignment*, and that therefore the return was right.

Sir W. Clarke's
case,
Cro. Eliz. 873.
Williams v.
Grey.
Salk. 12.

2. It seemed the better opinion in this case, that if the sheriff makes no return to a writ, that this action will lie.

3. The executor may maintain this action for a *false return i vita testatoris*, but this in the case of *final* only, not in the case of *mesne process* (as where upon a *fi. fa.* the sheriff returned that he had levied a part, whereas in fact he had levied the whole); for the levying of the goods a right vested in testator, and so in the executor, as part of testator's estate; but in the case of *mesne process*, it is a tort which dies with the testator, no property having vested.

4. It is necessary to observe, that some returns are void, though no action will lie on them, they not being false.

Palmer v.
Potter,
Cro. Eliz. 512.

As where the return was "*nulla bona*," and made *before the return-day* of the writ, it was held to be void; for though the defendant might have no goods *at the time*, yet he might at the time of the return.

So where the return was that the defendant was attached *per catalla ad valentiam* iol. this was adjudged a void return, for the return should set out *what the cattle were*, so that they might be forfeited, but upon such a general return, none of them could be forfeited.

Lawrence v.
Netherfole.
Cro. Eliz. 13.

5. But by stat. 21. Geo. 2. c. 37. s. 2. "No sheriff shall be called upon to make any return to any writ unless required so to do it within *six months after the expiration of his office*."

1. The six months are to be *lunar* months.

Rex v. Adderley.

2. The day the sheriff is superfeded, or goes out of office, is the first day, and reckoned inclusive.

Doug 446.
S. C.

3. But a mere request to the sheriff to return the writ is not sufficient; he must be required to make the return *by rule of court*, or he shall not be liable.

Rex v. Jones.
Trin. 27 G. 3.
2 T. Rep. 1.

2. OF INJURIES BY ATTORNIES.

1. "If in consequence of any neglect, mismanagement, or corruption of the attorney, the client suffers any loss either in his suit or otherwise, he shall recover damages in this action."

As where the defendant was attorney to the plaintiff in a cause wherein the plaintiff had a verdict and the defendant in that action having been surrendered in discharge of his bail, the attorney *neglected to charge him in execution*, whereby he was discharged, the action was held to lie against the attorney for such neglect.

Ryffel v. Palmer,
2 Will. 325.

"But as the damages in this action are not necessarily the full amount of the first judgment, *the remedy* must therefore be by this action, *not in a summary way*."

For where in debt, the party was arrested by the defendant who was plaintiff's attorney; but he having neglected to declare against him in two terms, the party was discharged on common bail. The plaintiff applied for an order of Court on the attorney, to pay the whole debt; but it was refused: the Court saying, that the plaintiff should bring his action regularly against the attorney: for, if the defendant in the first action was in solvent circumstances, the plaintiff might still recover against him, so that the whole sum should not necessarily go in damages against the attorney.

Pitt v. Yalden.
4 Burr. 2060.

2. Where an attorney takes upon him to appear for another, the Court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him.

Anon. Salk. 86.

3. "But the remedy for injuries by this action is not confined to the case of attorney and client: for if, in the conduct of a suit against any person, an attorney is guilty of any dishonest or unwarrantable practices, he is subject to this action at the suit of the party grieved."

For where the plaintiff had been sued by one Loft, to whom the present defendant was attorney, which suit had been non proffered and costs assessed; yet the defendant having knowledge

Knight v. Cop-
ping,
Hutt. 135.

of

TRESPASS ON THE CASE.

of this, had unduly and maliciously procured a judgment to be signed against the plaintiff, at the suit of Loft, and taken him in execution, under which the plaintiff had been imprisoned until delivered by writ of superfedas, the action was held well to lie.

But this case falls more properly under the head Malicious Prosecution. *Quod vid. Plenius.*

3. OF INJURIES BY JUSTICES OF PEACE.

For any breach or neglect of whose duty of office, this action lies against them.

2 Hawk. P. C.
90. 14 H. 7.
7 H. 19. Hale
P. C. 97.

Green v. Hundred of Buccleugh church,
1 Leon. 323.

1. As if a justice of peace denies, refuses, or obstructs bail where it ought to be granted, for such conduct he is liable to an action on the case.

2. So where the plaintiff was robbed, and he went to a justice of peace to take his depositions for the purpose of charging the hundred, which the justice refused to take, whereby the action against the hundred was lost; this action was adjudged to lie against the justice.

2. OF INJURIES BY PRIVATE PERSONS.

These are divisible into two heads. 1. To injuries where there has been a trust, and when the party has not performed a duty imposed on him by law: 2. Where there has been no trust, and the injury complained of is unconnected with any prescribed legal duty.

It should be previously observed,

"That to charge a person by reason of negligence in the discharge of his duty, it should clearly appear, that that which was required to be done was within the scope of that duty."

Whaley v. Wray,
3 Esp. N. P. C.
74.

For where in an action against a lighterman for loss of a quantity of rice intrusted to him to be deposited in the plaintiff's warehouses. It appeared that the injury to the rice had been occasioned by its lying in the lighter for a great length of time which delay was occasioned by the want of a permit to land granted upon petition to the commissioners, which it was the duty of the custom-house agent, and not of the lighterman, to have presented. Lord Eldon ruled, that this not being the common and regular duty of the lighterman he was not liable. That under a general declaration for negligence he could only be charged for neglect of what was his regular duty; and that if there was any thing out of the common course, it should be specially declared for,

1. Of Injuries where there has been a Trust, and so Non-performance of a Duty imposed by Law upon the Party.

These form the head of *Bailment*.

Bailment is of six kinds.

2 Ld. Raym.
903.
Com. Rep. 134.

1. "The first is a naked bailment, to keep for the use of the bailor, without any profit to the bailee: in this case the bailee

" 2

"is not chargeable, *except in case of gross negligence*; mere want of care is not sufficient."

As where the plaintiff, who was owner of a cartoon, left it with the defendant, who was an auctioneer, without any agreement to take care of it or re-deliver it safe, or without any agreement for a reward, and the cartoon was spoiled; for which the plaintiff brought this action, when it was adjudged on a motion for a new trial, that it was proper evidence to be left to a jury, Whether the defendant had been guilty of any gross neglect in the keeping of it, for such alone should charge him? and the jury found for the plaintiff on that ground.

Mytton v. Cook,
2 Stra. 1099.

So where the defendant, who was a general merchant, being about to export a quantity of leather cut out, the bankrupt applied to him to enter a parcel of the same leather at the custom-house for exportation to the same place; but the defendant was to derive no manner of advantage from it, *but did it merely gratuitously*; the plaintiff entered his own and the other's goods at the custom-house, *but by a wrong denomination*; in consequence of which both parcels were seized, and this action was brought by the assignees to recover damages *for the neglect*: but it was resolved, That the defendant having undertaken gratuitously to act for the defendant, not being to receive any reward, nor being in a situation which necessarily imported skill in that business which he so undertook for the other, and *having taken the same care of the goods which he had done of his own*, that he was not liable to an action for the loss of them.

Shields aff. of
Goodwin v.
Blackburn,
H. Black Rep.
158.

2. "The second kind of bailment is, the entrusting of goods to *be carried* or taken care of for hire or reward, in which case the bailee is chargeable for any loss: this is the case of *carriers*."

1. At common law, a carrier is liable by the custom of the realm to make good all losses of goods entrusted to him to carry, except such losses arise from the *act of God* or of the *king's enemies*: to which may be added, such as arise from the *default of the party sending them*.

Co. Litt. 89.
Coggs v. Barnard,
2 Lord Raym.
909, in which
case this doctrine is examined at great length.

As if a carrier is *robbed*, he shall be liable for the loss, not on the ground that he may charge the hundred under the statute of *Winchester*, but because, that if it was otherwise, he might by collusion procure himself to be robbed, and *defraud* the owner of the goods; and so in other cases where the grounds are the same.

Lane v. Cotton,
1 Salk. 143.

And a carrier is bound to provide proper means of conveyance for goods entrusted to him, as if by water, a boat or vessel tight and fit for the purpose; and if he does not, he is answerable for any loss by leakage or such other damage.

Lyon v. Mills,
5 East, 428.

But 1. *The act of God* shall excuse the carrier.

As where the defendant's hoy, having goods of the plaintiff on board, in coming through the bridge, was *by a sudden gust of wind driven against the arch and sunk*; the owner of the hoy was held not to be liable, the damage having been occasioned by the *act of God*, which no care of the defendant's could provide against or foresee: and though in this case the plaintiff gave in evidence, that if the vessel had been better she would not have sunk in consequence of the stroke, Chief Justice Pratt held, That a carrier was not obliged to provide a new carriage for every journey; it is sufficient

Amies v. Stephens,
1 Stra. 128.

sufficient if he provide one which, without any extraordinary accident, will perform the journey.

Graves v. Barge,
1 Roll. Rep. 79.

And upon this ground of its being the act of God, if a barge-man in a tempest, *for the safety of the lives of his passengers, throws overboard any trunks or packages of value*, he is not liable for the loss.

"But if the carrier of *his own accord goes into dangers, from which a loss is likely to accrue*, the act of God shall not excuse him."

As in the case of *Amies v. Stephens* (ante fol. 125.), where was further held, That if the hoyman had gone to sea *voluntarily in bad weather*, so that there was a probability of his ship being lost he would not have been excused.

"But it must fully appear that the loss *was* occasioned by the act of God, in order to excuse the carrier's presumption: that *it might so have happened* will not be sufficient."

Forward v. Pit-
tard,
1 T. Rep. 27.

For where the defendant, who was a carrier, having lodged his waggon in an inn, an accidental fire broke out, which consumed it; he was adjudged to be liable, though it was contended that it did not appear in this case *how* the fire broke out; so that *it might be by lightning*, and so be the act of God.

It was further held in this case, That negligence does not enter into the grounds of this action; for though the carrier uses a proper care, yet in case of a loss he is liable.

2. "The next exemption from losses by a carrier, is where: is done by the *act of the king's enemies*; but they must be public enemies, not traitors or felons."

Morfe v. Slue,
1 Vent. 109.
2 Lev. 69.
1 Mod. 85.
S. C.
Barclay v. Hig-
gins,
Pasc. 24 Geo. 3.
quot.
1 T. Rep. 33.
S. P.

For where it was found on a special verdict, that the plaintiff had delivered to the defendant on board his ship the goods in question, and that there was a sufficient crew for the ship, but that *at night eleven persons boarded the ship as pirates*, under pretence of pressing, and *plundered her of the goods*; it was adjudged, though by the admiralty law, if the ship is robbed by pirate the master is discharged; yet that *that* cannot hold, in this case the ship being *infra corpus comitatus*, the defendant was therefore liable; for superior force should not excuse him.

3. And lastly, *The default of the owner of the goods lost-himself* shall exempt the carrier in case of a loss."

Ferrar v. Adams,
Pasc. 10 Ann,
per Holt.
Bull. N. P. 74.

For where in an action against a carrier for negligently carrying a pipe of wine, which by that means burst, and the wine spilt, it was adjudged good evidence for the defendant that the loss happened while the defendant was driving gently, and *from the wine being in a ferment*; so that the loss was occasioned by sending it in that state.

Lovett v. Hobbs,
2 Show. 127.

So if a carrier's waggon is full, and yet a person forces his goods on him, and they are lost, the carrier is not liable; for was the owner's folly to act with so little precaution.

4. "But for all other losses arising from accident or peril, the carrier is liable, from whatever cause they proceed; unless the goods were received under a special acceptance limiting his liability."

Dale v. Hall,
1 Will. 281.

As where in an action against a barge-master for goods spoiled by water, the defendant proved, that when the goods were put on board, the vessel was tight, but that the damage was occasioned by a rat's eating out the oakum, through which the water came; it was held to be no excuse.

2. "B

2. "But in order to charge the carrier, these circumstances are to be observed:"

1. "The goods must be lost *while in the possession of the carrier himself, or in his sole care.*"

For where the plaintiffs sent their servant with the goods in question on board the vessel, who took charge of them, and they were lost, the defendant was held not to be liable; for the goods were in the possession not of the defendant, but of the plaintiffs' servants.

East India Company v. Pullen,
1 Stra 690.

2. "The carrier is liable only so far as *he is paid*; for he is "chargeable by reason of his reward."

For where a man delivered a bag, containing money, to a carrier; and being asked how much it contained, answered 200l. for which only he paid, and the carrier gave a receipt accordingly; in fact, the bag contained 400l. the carrier was robbed, and he was held to be liable only to the amount of 200l. being so much only for which he had received payment.

Tyley v. Morris,
Carth. 485.

If a carrier receives goods to be carried, he cannot retain the goods, and put the confignor of the goods upon proof of his title to them.

3 Esp. N. P. C.
115.

3. "Under a *general acceptance* a carrier is bound for what-ever he receives, but under a *special acceptance* for so much only as he *bona fide* undertakes to carry."

As if a carrier asks what is in a box, and is told silk; if it be money, and it is lost, the carrier is liable, unless he made a special acceptance. But the intended cheat may perhaps induce the jury to give less damages than otherwise.

Drinkwater v.
Quennel,
Trin. 11.
G. 2. C. B.
Bull. N. P. 75.

"But under a special or qualified acceptance he is bound no farther than he undertakes."

For where the owner of a stage-coach put out an advertisement, "That he would not be answerable for money, plate, or jewels, above the value of 5l. unless he had notice, and was paid accordingly:" it was adjudged in this case, that all goods so received by this coach were under that special acceptance; and that if money or plate was sent by it, without notice and being paid for, that, if lost, the coach-owner was not liable.

Gibbon v.
Paynton,
2 Burr. 2298.

And where an innkeeper published such a notice, "That cash, plate, jewels, writings, and other kinds of valuable articles would not be accounted for if lost, if of more than 5l. value, unless entered as such, and a penny insurance paid for each pound value;" It was decided that if goods above that sum in value are sent by a person who knows of these conditions, and does not pay the extra sum required, he *shall not recover even to the extent of the 5l. or the sum paid for booking.*

Clay v. Willan,
H. Black. Rep.
298.
Izett v.
Mountain,
4 East, 371. S. P.
Yate v. Willan,
2 East. 128.

Since the determination of this case, this clause by which carriers have limited their liability to 5l. has often come in question, and the legality of it was doubted by Lord Kenyon in the case of *Hide v. Proprietors of the Trent and Mersey Navigation*, 1 Espin. N. P. Cas. 35. However in this case it was decided to be legal; and further, that where the defendants were proprietors of two coaches, the one the mail, the other a heavy coach, and they had given the above notice; that though the plaintiff delivered his goods,

Nicholson v.
Willan,
5 East. 507.

which were above 5l. value, to be sent by the mail, and they were by mistake sent by the other coach and lost: That as no tortious conversion of the goods was proved, the defendants were not liable; for the loss happened still in their character of carriers, from negligence in sending the goods by the wrong conveyance; and they were therefore entitled to the benefit of the notice; and the goods being above 5l. value, they were not liable for any thing.

"The non-liability of carriers however to the extent of 5l. in consequence of their notice, depends upon the form of the notice, to which it is necessary to attend."

Clarke v. Gray,
6 East, 564.

In the cases just cited, the notice was, that "they would not be liable for any parcel *if above* 5l. value, unless paid for as such;" but where the notice was *that they would not be accountable for more than 5l. value in goods, unless entered as such, and paid for accordingly*, it was adjudged that they were liable to the extent of 5l. For that sum respects only the quantum of damages or the liquidation of them, leaving the contract for the carriage of them entire; whereas the former notice denies any contract for the carriage and liability in case of loss, for any parcels, even of 5l. value, unless paid for. And accordingly, under the latter notice, the plaintiff here recovered 5l.

Lyon v. Mells,
5 Co. 428.

But the carrier is held to the very terms of his special acceptance. Therefore where the notice was by a carrier by water, that he would not be answerable for any losses unless occasioned by want of ordinary care in the master and crew; it was adjudged that he was not thereby exempted from a liability to a loss arising from his own default in having a vessel not tight and fit for the purpose.

Gibbon v.
Paynton.

2. In this case Lord Mansfield seemed to be of opinion, that in all cases of *sending things of great value*, as money or jewels, by a common carrier, *the carrier should have notice of it*, and be paid accordingly; contrary to the case of *Titchburn v. White*, 1 Stra. 145. Somewhat similar to that of *Drinkwater v. Quennel*, ante.

"As the carrier by his notice claims an exemption from his legal liability, sufficient notice as to his limited liability must appear to be given to the public. The usual mode is by a painted board stuck up in the coach-office, which must be proved to be in large legible characters, and put up in a conspicuous place: the terms of the notice are as above."

Butler v. Herne,
2 Camp. 435.

Therefore where there was an advertisement in large characters on the door of the carrier's office, blazoning the advantages of his conveyance, but stating at the *bottom of it in small characters*, that he would not be liable for parcels of above 5l. value, this was ruled to be sufficient.

Gibbon v Paynton,
supra.

And note, That the notice in this case was by an *advertisement in the newspaper*, though it was proved that the plaintiff had been seen reading it; but the Court held that notice sufficient; and per Justice Yates, A personal communication is not necessary to constitute a special acceptance.

4. "A delivery to the *carrier's servant* is a delivery to himself, and shall charge him; but they must be goods such as it is the custom of the carrier to carry, not out of his line of business."

As where the plaintiff declared, that the defendant was the owner of a stage-coach, in which he had taken a place, and delivered a trunk to the driver of the carriage, for taking care of which he had given him a gratuity; the trunk was lost, and on action brought, C. J. Holt was of opinion, That this action did not lie against the master, for a *stage-coachman* was not within the custom as a *carrier*, unless he takes a distinct price for the carriage of goods; for his business is only to carry persons. Here was no price paid, the money given to the coachman being but a gratuity, not a price for the carriage; and the master is bound for the act of his servant only while he acts in pursuance of his authority.

Middleton v. Fowler,
1 Salk. 282

5. "Where goods are lost which have been put on board a ship, the action may be brought either against the master or against the owners."

For the owners are liable in respect of the freight, and having employed the master; for whoever employs another is answerable for him, and undertakes for him, and the master is chargeable on the same ground; for he may have an action for the freight. But if an action is brought against the owners, they should be all joined in the action, for it is *quasi ex contractu* as to all.

Boson v. Sandford,
2 Salk. 440.

Though if one only is sued, he must plead it in abatement that there are other partners; for he shall not be allowed to give it in evidence, and nonsuit the plaintiff.

Rice v. Shute,
5 Burr. 2611.

This is the case where the action is brought on the contract of the several owners, for if the action arises *ex delicto*, as where the action was for running down another vessel and brought against some of the part-owners, and they pleaded in abatement that there were other part-owners, not joined in the action; it was held to be bad, for the action was founded on a tort, and therefore they were severally liable.

Mitchell v. Tarbut,
5 T. Rep. 649.

"The rule therefore now is, that if the declaration charges several with negligently conducting themselves in the care of that which they had jointly undertaken to do for hire, or for deceit on a joint contract, the plaintiff cannot recover against one only, for the contract must be proved as laid."

Therefore where the declaration stated, That the defendants had the loading of a certain cart with the plaintiff's goods, for a certain reasonable reward to be therefore paid to each, and then charging that they so unskilfully, carelessly, and negligently conducted themselves in so loading that the goods were lost, and there was a verdict against one only, and a motion was made in arrest of judgment, on the ground that the action was laid in contract, and so that one only could not have a verdict against him; the court held that the action was in tort, and the plaintiff had judgment.

Govett v. Radridge and others,
3 East, 62.

"But this case has since been overruled according to the above distinction."

For where the action was Case for deceit on a joint warranty against two, on a sale of sheep, and the evidence proved a false warranty by one only, and the plaintiff had a verdict; on a motion for a new trial, it was adjudged that the plaintiff could not recover; for the action was founded on a contract which was declared upon as a joint one by two, and so should be proved to have been made by both, and did not arise *ex delicto* merely.

Weall v. King,
12 East, 452,
and vid.
Powel v. Layton,
2 New Rep. 365

Golding v. Manning,
3 Will. 429.
2 Blackst. Rep. 916. S. P.
Hyde v. Trent & Merley,
Comp. 5 T. Rep. 389.

Rowning v. Goodchild,
3 Will. 443.
Davis v. James,
5 Burr. 2680.
Vide Laclouch v. Towle,
3 Espin. Rep. 115.

Dawes v. Pelk,
8 T. Rep. 330.

Brown v. Hodgson,
2 Campb. 36.

King. v. Meredith,
2 Camp. 639.

Garfide v. Proprietors of the Trent Navigation,
4 T. Rep. 581.

6. It is not necessary in order to charge the carrier that the goods are lost *in transitu* while immediately under his care; for he is *bound to deliver them* to the consignee, or send notice to him according to the direction: and though they are carried safely to the inn, yet if left there till they are spoiled, and no notice given to the consignee, the carrier is liable.

And the law is the same in the case of *letters*, which the postmaster *must deliver* at the houses of the inhabitants within the post-town.

And note, it has been held, that if the action is brought by the consignor, the objection that the property is in the consignee does not lie in the mouth of the carrier; if the agreement for payment was with the consignor. *Sed Quare*, for

“ The rule of law, as to the person in whose name the action is to be brought, now must be taken to apply not to cases only where the consignor has agreed to pay the carrier for the price of the carriage of the goods, but the action must be brought by the person whose goods are lost.”

For where the defendant was a carrier, and had received goods from the plaintiff, which he had been ordered by another to send them by defendant's waggon, and they were lost: the plaintiff was nonsuited; for where the consignee of goods orders them to be sent by a particular conveyance, and they are so sent, they from that time become the property of the consignee, and the consignor can maintain no action for the loss of them.

“ And where goods are ordered generally, a delivery to the carrier by whom such goods are usually carried, is a delivery to the consignee, and the goods are deemed to be his from that time.”

And it makes no difference, though the consignor was to pay the carriage; for if lost, the consignee only can maintain the action. 7. “ But, in order to charge a person for goods lost when committed to him to carry, it must appear that the person was a carrier, and the goods in the way of his business.”

For where the case was, That the defendants received certain goods to be forwarded from *Stourport* to *Stockport*, by the way of *Manchester*, to which place the defendants were carriers; the goods were by them forwarded safely to *Manchester*; it appeared that according to the course of business, when goods are to be forwarded beyond *Manchester*, if there is any carrier from that place of their destination in *Manchester* when they arrive, they are delivered to him on payment of the carriage to *Manchester*. but if not, that the defendants keep them in their warehouse without charging any thing for keeping them, till a carrier arrives to whom they may be delivered: the goods in question arrived at *Manchester* on the thirtieth of *September*: there was then no carrier there from *Stockport*, upon which they were housed in the defendant's warehouse, where, by an accidental fire, they were the same night consumed: it was decided, That the defendants, in keeping them being for the convenience of the owner of the goods, of the carrier, that he was not liable; and that this was an attempt to charge him as a warehouse-man, which could not be he had been guilty of no neglect.

"And so the goods must have been fairly and without fraud delivered to the carrier, and in the usual way and time of taking in goods."

For where the defendant was a carrier by water between *Birmingham* and *Wolverhampton*, and so on to *Radford*, and the carriage from the different places was by different boats, the plaintiffs being possessed of a great quantity of corn which they were apprehensive would be seized by the mob, prevailed upon a servant of the defendant, out of the regular time of sailing, and with a barge out of the usual course, to take in a large quantity of corn, which the mob afterwards seized: it was adjudged, that the corn being taken at unusual times and under unusual circumstances, and the servant acting out of the course of his regular employment, the defendant, the carrier, was not liable.

Edwards v. Sherrett,
1 East, 604.

It was ruled in this case, which was an action by a passenger in a stage-coach, for the loss of his trunk, that the luggage of passengers was within the description of things for which the carriers advertised that they would not be liable if exceeding 5l. value, which was not confined to the case of parcels only; and that if lost, being of above 5l. value, the carrier was not liable.

Clark v. Gray,
4 Esp. N. P. C.
177.

"And any person carrying goods for hire is a carrier, and chargeable as such for any loss; as waggoners, captains of ships, lightermen, and such like."

Dale v. Hall,
1 Will. 281.
Rich v. Kneeland,
Cro. Jac. 330.

But to these are the following exceptions:

Uphare v. Aides,
Com. Rep. 25.

1. *Hackney-coachmen* are not carriers within the custom of the realm, so as to be chargeable for the loss of goods, unless paid expressly for the purpose; for they undertake but for the carriage of the person: and on the same ground *stage-coachmen* are not liable, unless they are paid extra.

2. The *postmasters general* are not liable for losses of bills or notes of value out of letters put into the post-office, for the post-office is for *intelligence*, not for *insurance*; and it is impossible that the postmasters can be answerable, who are to execute their offices in so many, and so very distant places.

Lane v. Cotton,
1 Salk. 17.

And this was so adjudged, though it appeared that the note in question had been taken out of the letter by a clerk employed in the post-office as a forter of letters.

Whitfield v. Ld. Le Despencer,
Cowp. 754.

3. By stat. 7 Geo. 2. c. 15. "The owners of ships are only liable for any loss by reason of embezzlement, secreting, or making away of any gold, silver, or diamonds, or other merchandize of value by the master or mariners, to the value of the ship and freight."

Sutton v. Mitchell,
1 T. Rep. 11.
ante.

As to liens claimed by carriers, see *ante*; and see 6 East, 524.

And note, "That where goods have been illegally taken from a carrier; as where goods were seized improperly on board a ship, which were not legally seizable, and which were not delivered to the consignee; it was ruled, that the owner of the goods had a right to call upon the carriers, the ship owners, and that they must have their remedy over against the officers who had seized them."

Gosling v. Higgins,
1 Camp. 452.

3. "The third species of bailment is a delivery by way of pledge, which is called *vadium*: as to which,

Com. Rep. 134.

1. "If the goods so pawned be stolen, the pawnee shall be discharged, for he had a special property in them himself, and

Co. Litt. 89.
Salk. 523.

"therefore is bound to keep them no otherwise than as his own;
 "and he shall therefore still recover the money for which the
 "pawn was given."

Manby v. West-
 brook,
 29 G. 2. K. B.
 Bull. N. P. 72.

But if the *pawner tenders the money*, and the *pawnee refuses it*, and *keeps the goods*, if they are afterwards lost, the pawnee is chargeable; for after the tender, the goods cease to be a pledge, and the pawner may have trover for them.

Anon.
 2 Salk. 522.

2. If the pawn be of somewhat which is not the worse for wearing, as jewels or such like, the pawnee may use them, but then it is at his peril, for if lost so, he stands at the loss; but it is otherwise if the pawn has been locked up, and not used: but if the pawn be of such a nature, that the keeping is a charge to the pawnee, (as if it be a cow or a horse) the pawnee may milk the cow or ride the horse, and this in recompence of the keeping.

Com. Rep. 134.

4. "A fourth species of bailment is the delivery of goods for hire; as hiring out an horse, which is called *locatio* or *conductio*; and here the hirer is to take all imaginable care; and if, notwithstanding, the thing be lost, he is not liable."

5. "A fifth species of bailment is a delivery of goods for some purpose (as to merchandize) without any reward: it is called an *acting by commission*; and though the bailee is to have nothing for his trouble, yet if there was any neglect in him, he will be answerable, for his having undertaken a trust is a sufficient consideration; but if the goods are lost without any default in him, he is not chargeable; for his having taken reasonable care shall discharge him."

Goswell v.
 Dunckerley,
 1 Str. 681.

As where the plaintiff had so bailed goods to the defendant, to merchandize for him, which were lost, and on an action brought, the defendant pleaded *that he had lodged them safely in a warehouse at Porto Bello, from whence they had been taken by the enemy*, and demurrer for cause, that by putting them out of his possession he had not taken due care of them; but *per cur.* If the warehouse was not a place of safety, the plaintiff should have replied so; for a special bailee is not to carry the goods about with him; and if he lodges them in a place of security, he shall not be charged in case of a loss.

Thomas et al. v.
 Day,
 4 Esp. N. P. C.
 262.

A warehousman is liable for goods lost or injured, from the time the crane is applied to raise them into the warehouse; and it is no defence, that they were injured by the falling into the street from the breaking of tackle, the carman who brought the goods having refused the offer of slings for further security.

Com. Rep. 124.

6. "The last species of bailment is a delivery of goods, from the keeping of which some profit arises to the bailee; as oxen to plough with, which are to be returned in specie; this is called an accommodation, a lending *gratis*: in this case, the borrower is bound strictly to keep the thing so lent, for if he be guilty of the least neglect, he shall be answerable, though he shall not be charged where he is in no fault."

Co. Lit. 37 a.

Com. Rep. 136.

But in this case the bailee *must use the thing lent in the manner intended*; as if a man lends another an horse to go into the west, and he goes into the north, and the horse dies, the bailee is chargeable; but if the horse be stolen out of the stable without

Ibid.

any

any fault of the bailee, no action lies; but otherwise, if he leaves the door open negligently, and the horse is stolen.

Under this head of bailment seems to fall the action against *innkeepers*, for they are chargeable with any losses happening in their inns by reason of the profit arising either from the keeping of the horses, &c. of their guests, or from the profits from the guests themselves.

As to whom it has been resolved,

1. The person chargeable as an innkeeper must be the *keeper of a common inn*, for such only are chargeable for the loss of the goods of the guests whom they entertain. Calye's case,
8 Co. 32.
Cro. Jac. 224.

It was moved in this case in arrest of judgment, that the plaintiff, in his declaration against the defendant, who was an innkeeper, had set out the house only as *hospitium*, not as *commune hospitium*; but it was over-ruled, for *hospitium* means a common inn; it would be *domus*, not *hospitium*, if it was not *commune*. Mason v. Graf-
ton,
Hob. 245.

2. It must appear that the person robbed in the inn was a *traveller and guest*; for if a neighbour comes to an innkeeper, and desires a lodging, such person is not a guest to recover against the innkeeper. Calye's case,
Ibid.

3. "So he *must be received* as a guest by the innkeeper, in order "to make him chargeable."

For if a traveller comes to an inn, and the innkeeper tells him his house is full, and the traveller replies, that he will shift or take his chance in the inn, which the innkeeper suffers him to do, and the traveller is robbed, the innkeeper is not liable; but if the traveller had not used these words, and the innkeeper, notwithstanding his first objection, had admitted him, he had been chargeable; for in the first case, the traveller takes all risk of loss upon himself, and the innkeeper refuses to take charge; but in the latter case, the admission is an implied waiver of the first denial, and so restores the right of charging him. Bird v. Bird,
1 And. 29.
Anon.
Moor, 78.

So where the case was that the plaintiff came to the defendant's inn with a pack of goods, which he had not been able to dispose of at market, and asked the defendant's wife if he could leave the parcel there till the next market-day, she said, she did not know, as they were very full of parcels: upon this he went into the kitchen and had some drink, and left the parcel down behind him: on rising to go, the parcel was gone. It was adjudged, that the defendant was liable, *J. Buller*, who tried the cause, being of opinion that if the defendant's wife had accepted the charge of the goods upon the special request made to her, that he would have considered her as a special bailee, and not liable, having been guilty of no actual negligence; but that he considered this as the common case of goods lost at an inn, in which case the innkeeper is liable. Bennet v.
Mellor,
5 T. Rep. 273.

4. "The loss to the guest must be occasioned by the act of the "innkeeper, or some of his servants, or through their neglect."

Therefore, if the guest is robbed by his own servant or companion, the innkeeper is not liable, because it was the guest's fault to have such persons with him; but if the innkeeper appoints another person to sleep in the room with his guest, and he is robbed, the innkeeper is liable. Calye's case,
8 Co. 22.

S. C. *Ibid.*

5. The innkeeper is only answerable for such goods of his guests as are within his house, and so are under his care: and therefore if a guest at an inn orders his horse to be turned out to graze, and the horse is stolen, the innkeeper is not liable; but if the innkeeper had turned the horse to graze out of his own head, he had been liable, for it was his own act, and the horse entirely in his own care.

Brand v. Glas,
Moor 158.
Dyer 206.

And even while the things are in the inn, if the innkeeper directs the guest to place his goods in a particular place, under lock and key, or he will not be answerable for them, and the guest refuses or neglects to do so, but puts them in another place, and they are lost, the innkeeper in that case is not chargeable.

Calve's case,
Ibid.

But without such particular direction from the innkeeper, if the goods are lost, it will be no excuse to say that he delivered the key of the chamber to the guest, and that he did not acquaint the innkeeper what the goods were; or that the thief is discovered.

6. "As the innkeeper is chargeable on the ground of the profit he derives from his guest or his goods, where there is no profit to the innkeeper, there shall be no charge.

Gelley v. Clark,
Cro. Jac. 188.
Noy. S. C.

Therefore if a guest comes to an inn, and departs leaving his goods there, and tells the innkeeper that he will return in a few days, and during his absence the goods are lost, the innkeeper shall not be charged; for he has no profit or gain from the keeping of such dead goods, and therefore shall not be chargeable for their loss.

But to this are these exceptions:

Sir Edwin Sand-
dy's case,
Cro. Jac. 189.

1. It must not be a temporary absence; as if the guest goes out in the morning about business, and returns before night, this is not such an absence as shall excuse the innkeeper.

York v. Grinde-
stone,
Salk. 388.

2. This is confined to the case of *dead goods*; for if the guest leaves his horse there for any time, though he is not there himself, the innkeeper shall be charged in case of a loss; for the standing of the horse is a profit to the innkeeper, and in respect of that he is chargeable.

Crofts v. An-
drews,
Cro. Eliz. 622.

7. It was adjudged in this case, That where to an action against an innkeeper for goods lost in his inn, he pleaded, that at the time that the plaintiff lodged in his inn, *he was sick and of non-sane memory*: on demurrer to this plea, it was held, That if a man keeps an inn, he ought at his peril to take care of the goods of his guests, and if he be sick, that his servants ought; and that it lieth not for him to say that he was of non-sane memory to disab himself in this action, no more than in debt on an obligation.

Calve's case,
8 Co. ante.

8. The writ against innkeepers, mentions only *bona & catalla*, which properly does not comprehend deeds or writings, which are only *choses in action*; yet by reason of the words in the writ, "*quod hospitibus nullum eveniet damnum*," they are comprised and for the loss of these the plaintiff may declare specially.

Ibid.

But these words confining the loss to moveables, the innkeeper shall not be liable for any loss or injury done to the person of his guest while in the inn; as an assault, battery, or such.

Beeble v. Mor-
ris,
Cro. Jac. 224.
Yelv. 162.
S. C.

9. If a servant is robbed of his master's property, the master may maintain this action against the innkeeper at whose inn the goods were lost.

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in such suit by the master, he need not show that the servant was on a journey, for perhaps he was at the end of his journey; London, on his master's business.

If one joint-tenant of goods is robbed, both may join in this

Another case in which an action lies against an innkeeper is, for refusing to entertain a traveller, and to provide him with meat, he tendering him the proper price for the same.

Drope v. Thayne, Noy. 79. Poph. 179. Drope v. Thayne, Latch, 127. Anon. Keilw. 50. Anon. Dyer 158. pl. 33.

INJURIES TO PERSONAL PROPERTY IN CASES WHERE THERE IS NO TRUST, AND WHICH ARE NOT CONNECTED WITH THE PERFORMANCE OF ANY DUTY IMPOSED BY LAW.

The principal injuries under this head, are, 1. For maliciously suing out a commission of bankruptcy: 2. For deceit in sales: 3. For not procuring an insurance: 4. For infringing copyright: 5. For the malicious use of any power or authority.

Injuries by maliciously suing out a Commission of Bankruptcy.

Any person shall maliciously sue out a commission of bankruptcy against another, which commission is afterwards superfed, an action of case lies against such petitioning creditor at the suit of the bankrupt; and this notwithstanding the bond given in pursuance of stat. 5 G. 2. c. 30. to the chancellor in the penalty of 200l. conditioned to prove the bankruptcy, and by him assignable to the bankrupt, for this bond may be inadequate to the damage suffered; and though there is the same remedy under the statute, yet this is a common law remedy, and the statute being in the affirmative, both stand together.

And where a commission has been fraudulently or maliciously sued out, the Lord Chancellor under stat. 5 Geo. 2. may order a subpoena by way of damages, or assign the bond given by the petitioning creditor to enable him to recover the whole penalty; and judgment by him is conclusive evidence of fraud or malice.

Brown v. Chapman, 3 Burr. 1418.

Smith v. Broomhead, 1 T. Rep. 300.

2. Of Injuries from Deceit in Sales.

This respects warranties or frauds in the cases of sales: 1. Where there is some fraud or deceit on the part of the seller: 2. Imposition from cheating, or false pretences.

Imposition or deceit in the seller may be either, 1. In the value or price of the thing sold: 2. In the seller's title to it.

Where a thing is of a certain value, and that known to the seller, but cannot be known to the buyer; for any deceit in the seller in assigning the value to be different from what it is, this action

lies where a landlord of an house, wishing to dispose of his estate in it, affirmed the rent to be more than it really was, where the purchaser was induced to give more for it than it was worth; this action was held to lie; for the value of the rent

Rifney v. Selby, 1 Salk. 211.

was a matter of private knowledge between the landlord and tenant.

"But if the buyer *has it in his power to inform himself of the true value and neglects it*, the action will not lie."

S. C.
Lord Raym.
1118.

Vernon v. Keys,
12 East 632 S. P.

As if the landlord had only said, that J. S. would give so much for it, whereas J. S. had never offered any thing, the action would not lie, for the buyer might have enquired from J. S. and been informed of the truth.

Leakins v.
Cliffel,
1 Sid 146.

This is the case of things of certain value, but where the things sold are of *uncertain value*; that is, which may depend on whim or fancy, as *pictures, or such things* which may be of more value to one person than to another, there no action will lie, in case of taking an exorbitant price.

Harvey v.
Younge,
Yelv. 20.

2. "But it has also been held to lie for a sale of a thing where the feller is *ignorant* of the value, and that is, where he sells it *with a warranty* of its value or quality."

Chandler v.
Lopus,
Cro Jac. 4.

As where the plaintiff declared that the defendant, being a goldsmith, and having a skill in precious stones, had a stone which he affirmed to be a *Bezoar-stone*, which he sold to him for 20*l*. *ubi revera* it was not a *Bezoar-stone*; the defendant pleaded not guilty, and the plaintiff had a verdict; but the judgment was afterwards arrested, because that the declaration had not charged either that the defendant sold it *knowing* it not to be a *Bezoar*, or that he had warranted it for such a stone.

Though if he had sold it with a warranty, assumpsit would be the proper form of action.

Grammar v.
Nixon,
1 Stra. 653.

3. "If a *servant* sells any thing in the way of his master's business, and *warrants it*, if there is any fraud or deceit, the master is liable."

As where a goldsmith's apprentice sold an ingot of gold and silver, upon a special warranty that it was of the same value with an assay then shewn, and upon evidence it appeared, That he had forged the assay, and made the ingot out of a lodger's plate that he had stolen; the master was held to be liable.

"And even though the feller himself has been deceived by his servant, yet is he liable to the buyer."

Hern v. Nichols,
1 Salk. 289.

For where a merchant sold silk to another, which afterwards appeared not to be of the kind the purchaser meant to buy, whereby he was imposed upon in the value; he recovered against the merchant the feller, though it appeared that there was no actual deceit in the feller, but that it was in his factor beyond sea; for he should be answerable for the deceit of his factor *civiliter*, though not *criminaliter*: and since somebody must suffer, it was more reasonable that he who trusted the factor should be a loser than the other.

4. "But in order to charge the feller by reason of his warranty, it must be observed,

Fitch's Law,
189.

1. "That the warranty does not *extend to defects visible to the eye* of the buyer, for of these he must be apprized at the time of the sale; but if the defect is not visible, there a general warranty shall extend to it, and subject the feller in case of a fraud."

As on a warranty on the sale of cloth that it is of such a length, and it turns out to be otherwise, this action lies against the feller; because

because such a defect is not visible to the eye, but is to be discovered only by measuring.

But where the warranty was on *the sale of an horse*, which was warranted sound by the seller, and it appeared afterwards that *he was blind*, this action was held to lie; for though blindness is a defect in general visible to the eye, yet *in horses it requires skill to discern it*.

Butterfield v. Burroughs. Salk 24.

2. "The warranty must be made *at the time of the sale* and not after it, in order to charge the vendor; for if made after the sale it is made without consideration: neither does the buyer then take the goods on the credit of the seller."

Finch's Law, 289.

"So the warranty should be in the present tense, that the thing *is found*, not that *it will be found*."

3 Black. Comm. 159.

"And where there is an express warranty, the warrantor undertakes that it is true at the time of making it, and no length of time elapsed after the sale will alter the nature of a contract originally false; and if it be false and fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return of the thing or notice."

Per Lord Loughborough, H. Black. Rep. 19.

For where in an action on the warranty of a mare sold by the defendant to the plaintiff, it was proved, That in *March 1787* the defendant sold the mare to the plaintiff, and *warranted her found and free from blemish and vice*: soon after the sale, the plaintiff discovered that she was unsound and vicious; he however kept her for three months, and endeavoured to cure her: at the end of three months he sold her, but she was returned as unsound. After she was so returned to the plaintiff, he kept her till the month of *October*, when he returned her to the defendant, who refused to receive her: on her way back to the plaintiff's stable she died; and it was the opinion of farriers *that she had been unsound a twelvemonth before*; it also appeared that the plaintiff and the defendant had been often together, during the period he had had her, but it did not appear that the plaintiff had ever acquainted the defendant with the circumstance of her being unsound: the jury found a verdict for the plaintiff; and on a motion for a new trial, the Court held the above doctrine, and refused it.

Fielder v. Stark-in, H. Black. Rep. 17.

3. "An offer of a warranty *at one time* shall not extend to a *subsequent sale* of the same thing."

For where the defendant came to the plaintiff, who was a sword-cutler, and offered to sell him a second-hand sword, and warranting the hilt to be silver; the plaintiff offered him a guinea and a half for it, which the defendant then refused; but having offered his sword to many sword-cutlers, and none bidding him so much as a guinea and a half, he returned to the plaintiff, who then would give him but twenty-eight shillings, which the defendant took: it appeared afterwards that the gripe only was silver, and the rest brass; upon which the plaintiff brought this action on the *first warranty*, when the Court were of opinion, *that it did not extend to the subsequent sale*; and the plaintiff was nonsuited.

Anon. 1 Stra. 414.

4. If the vendor, knowing the goods to be unsound, *uses any art to disguise them*: or if they are in any shape different from what he represents them to be to the buyer, this action lies; for this artifice shall be deemed equivalent to an express warranty.

Southern v. Howe, 1 Roll. Rep. 5.

"And

"And in general, where goods are sold without fraud on the part of the seller, and without any warranty, the rule of *caveat emptor* applies. Therefore if goods are sold by sample, without any warranty, there is no implied warranty that they are merchantable, and if they correspond with the sample it is sufficient."

Parkinson v. Lee, 2 East. 314.

For where hops were sold by sample, and the bulk corresponded with the sample, but having been watered by the grower, it had generated a latent defect of heating, which spoiled the hops; but that was unknown to the seller; it was adjudged, that he was not liable, that he could be only charged by reason of their not corresponding with the sample, and not on any implied warranty of their being merchantable; and there being no fraud imputable to the seller, and no warranty, no action would lie, as they corresponded with the sample.

2. "The second species of fraud in the seller on which this action is founded, is where there is a fraud in the representation he makes of his title to the thing sold."

Harding v. Freeman,
Style, 311.

As where the plaintiff declared that the defendant, affirming a certain horse to be his own, and that he had bred him, sold him to the plaintiff; whereas in fact *he had never bred him, and he was the property of J. S.* the plaintiff recovered notwithstanding there was no express warranty or averment that the defendant knew that the horse belonged to J. S.

Furnis v. Leicester,
Cro. Jac. 474.
Croft v. Gardiner,
S. P.
Show, 63.

And the buyer may maintain this action against the seller, who so sells without any title the goods of another, *though he has never sustained any damage, or the true owner has not retaken them, or sued him for them*; for the sale under these circumstances is itself an offence; and if he should wait till the goods were retaken, he might be remediless, and sustain a mischief.

Medina v. Stoughton,
Salk. 210.
L. Raym. 593.
S. C.

2. The gist of the action therefore is the sale, the seller *knowing* the goods not to be his own property; for the declaration must be that he did it *fraudulently or knowing them not to be his own*: it is therefore incumbent on the plaintiff to prove that fact, that *the defendant knew the things sold not to be his own* at the time of the sale; for if the defendant had a reasonable ground to believe them to be his property (as if he bought them *bona fide*) no action will lie against him; but the defendant cannot plead such matter, he must give it in evidence.

Warnerv. Tallard, quot.
9 Danv. 176.
pl. 7.

3. Of the same nature with this fraud is where a person affirming that certain goods are the property of his friend, and that *he has authority to sell them*, in fact sells them, he having no such authority; in which case this action lies for the deceit.

Bull. N. P. 30.

In this case the deceit being in the false affirmation, it will be sufficient for the buyer to prove them the goods of another, without proving that the defendant knew them to be so (for it need not be averred in the declaration); and this proof would be sufficient to put the defendant upon proof that he had authority to sell them.

Medina v. Stoughton,
Salk. 210.
2 Ref.

But in both cases, if the seller is *out of possession* of the thing sold at the time of the sale, no action will lie against him, though the thing sold was not his own, unless there was an express warranty;

ranty; for being out of possession, there was room to question his title, and in such cases it is *caveat emptor*.

As where the defendant, affirming that he was incumbent of the living of *Stoke*, sold the tithes to the plaintiff, when in fact he was not incumbent, and had no title, the action was held not to lie on the ground above-mentioned, he not being in possession.

Roswell v.
Vaughan,
Cro Jac. 196.

2. The second ground of this action, as founded on deceit, is where an injury is done to any person from an imposition *in cheating or using false pretences*.

As where money was left in the hands of a third person to be delivered to the plaintiff, and the defendant pretending to such person that he was the plaintiff, obtained the money; this action was adjudged to lie against him.

Thompson v.
Gardner,
Moor. 583.

"So for cheating a person with false cards or dice of any sum of money, this action will lie."

Harris v. Bow-
den,
Cro. Eliz. 90.
Johnson v. Pyc.
1 Sid. 258.

But it was decided in this case, That where a person, affirming himself to be of full age, had obtained several sums of money, whereas in fact he was under age, and so not liable to the money borrowed, that the action did not lie; for being an infant, his contracts were all void.

So assuming a false character, and by that means committing a cheat, is actionable: as if a man, pretending to be single, prevails on a woman to marry him, when in fact he is married, this action will lie. *Sed quare?* this being felony.

Skinn. 119.
Garford v.
Richardson,
Trin. 36 Car. 2.
Bull. N. P. 32.

But if a woman who is married, commits a similar fraud, no action will lie against her and her husband; for all actions of a *female covert* are void.

Cooper v. What-
ham,
1 Lev. 247.

3. "A third ground of this action founded on deceit, is where a party knowing another to be in bad and insolvent circumstances, represents him to a third person, as a man of credit and property, by which such third person is induced to trust him with goods or property. In which case this action was held to lie, though the party derived himself no advantage from it, nor colluded with such third person."

Palley v. Free-
man,
3 T. Rep. 52.

And that it was no excuse that the defendant said, "if the party (whom he was recommending) does not pay you, I will;" for as this promise was void under the statute of frauds, the injury was the same.

Harman v.
Alexander,
2 Bot. and Pull.
N. R. 141.
Haycraft v.
Creasy,
2 East. 92.

The principle, however, above laid down in *Paisley v. Freeman*, has been restricted by later decision: and the law as it now stands is, that as the foundation of this action is fraud and deceit in the defendant who made the representation, by which the plaintiff has sustained a loss; if the party who made the representation did it *bona fide*, and from a full conviction in his own mind that the person of whom he made the representation was solvent, no action will lie, though the representation turns out to be untrue, and though the party asserted it on his own knowledge; if what he so asserted was from his own knowledge was his firm belief; for there was no *volens fides* nor fraud intended.

And if a person employs an agent to take orders, and a representation is made to him of the solvency of any person, whom he therefore advises his employers to trust for goods: if at the time the agent himself knew that such person was not solvent, but did not

Cowen et. al. v.
Simpson,
Eq. N. P.
Cas. 290.

TRESPASS ON THE CASE.

not communicate it to his employers, they cannot maintain action against the person that made such false representation.

3. A third case of injury to personal property for which action lies, is,

For not procuring an Insurance.

Smith v. Laffcelles.
2 T. Rep. 187.

For where a merchant gives instruction to his correspondent to effect an insurance on a ship of his, and he neglects to do it, he lies under the following circumstances: 1st. When the merchant abroad has effects in the hands of his correspondents in England, he is bound to insure, if ordered so to do; for the merchant abroad has a right to appropriate his money in the hands of the other in any manner he thinks proper: 2dly, When there are effects of the merchant abroad in the hands of the other, but the course of dealing has been such, that the one has been used to give orders for insurance, and the other to comply; in such case the merchant here neglects to make an insurance, he shall be liable unless he has given notice to discontinue such dealing: Where the merchant abroad has sent bills of lading to his correspondent in England, he may engraft on them an order to insure, as the implied condition on which they are to be accepted, and the merchant here must obey if he accepts them.

Wallace v. Telfair, Sitt. Guildhall 1786, coram Buller, Just. 2 T. Rep. 187.

Smith v. Cadogan, 2 Term. Rep. 187.

But if the merchant abroad limits the merchant in England to too small a premium, so that no insurance can be procured, the merchant here shall not be liable.

So where the merchant here uses due diligence to procure insurance, which cannot be done, (as here, because the ship was not registered at Lloyd's coffee-house), and he afterwards, by some means, gets an insurance, which turns out ineffectual, but without his fault; (as where it was sent to a house at Newcastle which house fraudulently kept the policy;) the merchant was held to be discharged.

Wilkinson v. Coverdale, Espin. N. P. Caf. 75.

So where the plaintiff had purchased certain premises from the defendant in the month of August 1792, on which the defendant had at that time a subsisting policy, which expired the December following; the defendant undertook to get the policy renewed, and in fact did get it renewed, and charged 16l. to the plaintiff for the premium, but had neglected to get the assignment of the policy allowed at the office. The premises were burned, and the plaintiff was unable to recover against the fire-office, on account of the neglect of having the assignment allowed, and then brought this action against the defendant to recover the amount of his loss. It did not appear that the defendant had any consideration for getting the policy effected; but Lord Kenyon, on the authority of *Wallace v. Telfair, supra*, held, that where a party voluntarily undertook to procure an insurance for another, he did get a policy underwritten, but did it so unskillfully, that the party could derive no benefit under it, although there was no consideration, yet he was liable to an action.

Per Ld. Mansfield, Cow. 480.

"For to maintain this action, the defendant must be guilty of a breach of orders, gross negligence, or fraud; and to

"matters the attention of the jury is to be directed, who, if they find that the defendant was guilty of none of these, the Court will give judgment for him."

Therefore where the plaintiff, who was a merchant in *Alicant*, sent instructions to the defendant, who was his agent in *London*, to insure a cargo of fruit; *the instructions were general, nothing as to insurance in any particular place or manner*; the defendant insured the cargo at the *London Assurance-office*, at which office, in policies upon fruit, there is an exception of being "*free from particular average*;" the policy was made with this exception: a loss happened, but it was only a partial one, so that the plaintiff had no benefit from the policy, and he brought this action for neglect in effecting the insurance; but it not appearing that he had been guilty of any gross neglect, or of any *mala fides*, he deriving no advantage from the insurance made in that way, more than in any other, the jury found for him; and on a motion for a new trial, the Court confirmed the verdict.

Moore v. Morgan,
Cowan, 479.

4. Of Injuries to Copyright.

By stat. 8 Ann. c. 19. it is enacted, "That the author of any book shall have the sole right of printing it for fourteen years; and any printer printing, or causing such book to be printed without leave of the author, shall forfeit the books and 1d. per sheet for every sheet published; and if the author is living at the end of fourteen years, he has a further term of fourteen years given, with the sole right of printing for that time."

Vid. Miller v. Taylor,
4 Burr. 2380.

Under this act it has been decided,

1. That an author, whose book is pirated before the expiration of the twenty-eight years from the first publication of it, may maintain an action on the case for damages against the person pirating it, although the book was not entered at Stationers' Hall, and although it was first published without the author's name.

Beckford v. Hood,
7 T. Rep. 509.

For, per Lord Mansfield, 2 Black. Rep. 330.; it was always held, that the entry at Stationers' hall, was only necessary to enable the party to bring an action for the penalty, but the property is given absolutely to the author, at least, during the term.

2. "It is not necessary that the whole of the work should be new, to entitle the author to his action, for the action lies for pirating the additions and corrections made by any person to an old work."

As in this case, where the plaintiff had been employed in 1797 by the postmaster-general to make a survey of the roads. He published an edition of Paterfon's Roads, which had been published in 1788 by another, with considerable alterations and additions. It was adjudged that the plaintiff, as author, had a clear copyright in his additions and alterations, and that case lay for pirating them.

Cary v. Longman, 1 East,
358.

3. "As to how far the work of one author may be embodied into another publication, it was ruled by Lord Ellenborough, where a treatise "On the Art of Defence with the Broad-sword," had been in great part copied verbatim into the Encyclopedia, in an action for this piracy, that if an author's original work is so far copied

Roworth v. Wilkes,
1 Camp. 94.

"copied into even a work of general compilation of literature, that if the latter will serve as a substitute for the former, though there was no intention to pirate, that still it is an infringement of the author's copyright, and that the action is maintainable."

Coleman v. Wathen,
5 T. Rep. 245.

Cary v. Kearsley,
4 Esp. N. P. C. 168.

4. The act requires the *publication* of the work as necessary to subject the party pirating; and in this case it was held that acting a piece on the stage is not such a publication as comes within the act.

5. It was in this case held by Lord *Ellenborough*, 1. That in case for pirating a book it was not sufficient evidence of general pirating of a book to show that there had been certain errors and mistakes in the original book which had been found printed *verbatim* in the pirated edition.

2. That it was not sufficient to shew that part of the original work has been transcribed into the other, for it is lawful to use former publications in the composition of a new work, if fairly made, and not as a colour to pirate the original work.

3. It is no defence to an action for pirating the original work, that the materials of it, were improperly obtained and belonged to another; as here, that the plaintiff had been employed to make surveys by the post-office, and had taken them to his own use, and published the book from materials which belonged to them.

Clementi v. Goulding,
11 East, 244.

6. Printing a *single sheet* of music is within the statute, though the words of the statute are "Books."

7. "As to the copyright of *prints*, the stat. 8 Geo. 2. c. 13. gives the copyright of prints to the inventor, designer, &c. for 14 years; which shall be truly engraved with the name of the proprietor on each plate, under a penalty:" and this is extended to 28 years by stat. 7 G. 3. c. 38. and an action given by stat. 17 G. 3. c. 57."

Sayre v. Moore,
In Not. 1 East, 361.

Thompson v. Symonds,
5 T. Rep. 41.
Per Lord *Ellenborough*,
1 Campb. 98.

But the publication of sea charts is not within the act of parliament.

Though the action lies for pirating an original print under stat. 17 Geo. 3. c. 57. which respects the copyright of prints.

An action will lie for pirating a print, though the inventor and designer's name is not on it, by common law.

5. Of Injuries arising from the malicious Use of any lawful Power or Authority to the Oppression of another, and the Injury of his Property.

Sutherland v. Murray, quot.
1 T. Rep. 538.

As where this action was brought against the defendant, who was governor and vice-admiral of *Minorca*, by the plaintiff, who was judge of the vice-admiralty court, "for maliciously and without probable cause suspending him from his office, *per quod* he lost the profits and emoluments of the same;" it appeared that the defendant had legal authority to suspend, till the king's pleasure was known; that he had professed himself ready to restore the plaintiff on his making a particular apology; and the king approved of the suspension unless the terms were complied with; notwithstanding which the plaintiff recovered 5000l. damages, on the ground that the suspension was malicious, and had been confirmed by means of the defendant's false and malicious representations at home.

But

But where the action was by the plaintiff, Captain *Sutton*, for suspending him from his command of his ship, and carrying him about with the fleet as a prisoner, until he was tried by a court-martial, when he was acquitted; against the defendant, who was commodore and commanded it, the action was held not to lie; as being of dangerous consequences to the discipline of the navy, to permit such actions to be brought against the commander, and particularly as he was subject himself to suspension and dismissal from the service for any cruelty or oppression to his officers; and that therefore the only redress was by a court-martial.

Sutton v. Johnstone,
1 T. Rep. 498.

3. OF INJURIES TO REAL PROPERTY.

Injuries to real property fall under the two heads of, 1. *Nuisance*; 2. *Disturbance*: the first respecting corporeal, the latter incorporeal hereditaments.

I. OF NUISANCE.

Nuisance is either to the house or to the land.

1. Of Nuisance to the House.

1. "If a man has an ancient house, and another builds so near to him that he deprives him of the benefit of light and air, by darkening his windows; this action lies against the wrongdoer."

"But to maintain this action, it is said that the house must be an *ancient house*; that is, have stood there time immemorial; for if two men have land adjoining, and one builds a house on his own land, and makes his windows look into his neighbour's land, though his house may have stood thirty or forty years, yet may his neighbour build an house on his own land, and obstruct the other's lights; for *cujus est solum ejus est usque ad caelum*, and it was folly in the first person to build so near the land of another."

Bury v. Pope,
Cro. Eliz. 218.

But, however, in an action for stopping and obstructing the plaintiff's lights, Justice *Wilmot* said, that where an *house has been built forty years, and has had lights at the end of it*, if the owner of the adjoining ground builds against them so as to obstruct them, an action lies; and this is founded on the same reason as when they have been immemorial, for this is long enough to induce a presumption, that there was originally some agreement between the parties: and he said, that as twenty years was sufficient to give a title in ejectment, on which he might recover the house itself, he saw no reason why it should not be sufficient to entitle him to any easement belonging to the house.

Lewis v. Price,
Worcester Sum.
Ass. 1761. MS.

This rule as to time is however now much abridged, for if a person has had his house erected, and enjoyed for *twenty years*, no person can by any erection lawfully obstruct his light.

Douglass v. Wilton,
2 Saund. 175. in not.

"But to give such right, the party must have enjoyed his lights for twenty years with the knowledge or permission of the owner of the soil."

For

Daniel v. North,
11 East, 372.

For where the plaintiff's and defendant's premises adjoin but the defendant's had been *let to a tenant*, and the plaintiff had used his lights for twenty years, to which the tenant made no objections or gave any molestation, but the landlord knew nothing of it; it was adjudged, that that did not bind his landlord, the defendant, but that on the tenant quitting, the defendant might obstruct the lights.

Palmer v.
Fletcher,
1 Lev. 122.

2. But if a man builds an house upon any part of his own land and afterwards sells that house to another, neither the vendor nor any person claiming under him shall be allowed by any erection to stop the lights; for no man shall be allowed to do an injury in derogation of his own grant.

9 Co. 58. b.

3. But where a man has such ancient messuage, and so prescribes to have his lights uninterrupted, no contrary prescription to stop the lights shall be alleged against it; for each being supposed to have existed from time immemorial, the latter cannot be deemed more ancient than the former.

4. "If a party gives a licence to another to erect any thing near him, which after it has been erected turns out to be a nuisance to him, no action can be maintained."

Winter v.
Brookwell,
8 East, 308.

For in this case it was decided, That a parol licence from the plaintiff to put a sky-light over the defendant's area, which impeded the light and air from coming to the plaintiff's dwelling house through a window, could not be recalled, after it had been erected at the expence of the defendant, or at least without tendering the expences he had been put to; and therefore the party who gave such licence could not maintain an action for the nuisance of the bad smells created by so shutting up the area.

Ibid.

And the rule laid down is, that a licence executed is not countermandable.

5. "It should seem, that where a man builds his house near a street, he is entitled to all the privileges of an ancient messuage."

Leader v.
Moxon et al.
3 Will. 461.
2 Black. Rep.
924. S. C.

For this action was adjudged to lie against the commissioners for paving, for raising the street so high as to obstruct the plaintiff's lights and windows; for the ground of the street being appropriated to the public, excludes the idea of folly in building near the ground of another, and close to the street is the most proper situation.

9 Co. 58.

6. But raising a wall to obstruct a prospect, or in anywise to prevent it, is not actionable; for it only deprives the party of a matter of pleasure, and abridges him of nothing either useful or necessary.

Westborn v.
Mordaunt,
Cro. Eliz. 191.
2 Leon. 103.
S. C.

7. A recovery of damages in this action does not discharge the nuisance; for every continuance of it subjects the offender to a new action, and therefore a person may recover damages for a nuisance to an house which commenced before he came into possession, if it existed when he entered.

Roswell v.
Prior.
Salk. 460.

Therefore where the plaintiff recovered damages against the defendant for a nuisance to his house, and the defendant afterwards under-let it, and this action was for a continuance of the nuisance after the under-lease, it was held well to lie; for as he was before liable to an action for the continuance, he should not discharge himself by his own act of underletting; and as he had a rent in consideration of the continuance of the nuisance, he ought to answer for the damages it occasioned.

So

So also may an action be maintained *against the assignee* for a continuance of the nuisance; but with this distinction, that where the whole mischief has been done to the plaintiff by the first erection, there the action will not lie against the assignee; but where the continuance occasions a new nuisance, the assignee is liable.

7. This action may be maintained by the *lessee for years*, for obstructing the lights of an ancient messuage, grounded on the *prescription*, notwithstanding the weakness of his estate; for the prescription is to the house, not to the person.

So also may he in *reversion*, as well as he in possession, maintain an action for a nuisance, by obstructing the lights; for it is an injury to the *inheritance* as well as to the present enjoyment; and each may have his own action.

2. A second species of nuisance to the house consists in *overhanging it*, or building so near to the house of another that the water falls off his roof on that of his neighbour, and thereby injures and rots it.

Of the same nature also was the case of putting up a spout, which conveyed the water into the premises of the adjoining neighbour: this was a nuisance, and actionable.

3. A third species of nuisance to the house, is by *infesting it with bad and noisome smells*, so as to make it unwholesome to reside in; but this falls under the first head of Injuries to the Person.

2. Of Nuisance to the Land.

1. "If any person erects a smelting-house, or works for making *aqua fortis*, or such like, the vapour and smoke of which spoils the grass or corn, or injures the cattle of his neighbour, it is a nuisance to the land, for which this action lies."

2. If a person suffers the ditch adjoining to his neighbour's land to become foul, or throws stones or rubbish into it, which causes it to overflow, and so injures the land, this action will lie for the injury.

3. So, if a person who has a right to a stream of water running to his land or mill, and another person turns it; or if that person, having a right to the use of it in a certain proportion, varies from that proportion, trespass on the case will lie against him. As in this case, where the defendant prescribed to have water from a certain watercourse, running through the plaintiff's ground, to two pits on his ground, for watering his cattle, it was adjudged that an action lay for deepening and widening those pits.

The same point was decided in this case, and further, that even where the plaintiffs only claimed the surplus water from defendant's mills, that the defendant could not diminish that surplus.

But where a man has by prescription a right to a stream of water, he may vary the uses to which it is applied: as where formerly there was fulling-mills, he may alter them to corn-mills, if he does not alter the quantity of the water.

4. Another injury to the land is, if a man suffers such a number of comies upon his land that they go in on that of his neighbour, and spoil it, and yet for this no action will lie, for they are animals *feræ naturæ*, in which he has no property. *Vid. post.*

Rippon v.
Bowles,
Cro. Jac. 473.

Symonds v.
Seybourne,
Cro. Car. 325.

Jeffar v. Giffard,
4 Burr. 2141.

Reynolds v.
Clark,
1 Stra. 634.

Wm. Aldred's
case,
9 Co. 57. a.

1 Roll. Ab. 89.
Rex. v. White,
1 Burr. 260.

Westbourn v.
Mordaunt,
Cro. Eliz. 191.

Brown v. Best,
2 Will. 174.

Bealey v. Shaw,
6 East, 208.

Luttrell's case,
4 Co. 84.

Bowllon v.
Cro. Eliz. 547.
5 Co. 104. S.C.

Some v.
Barwith,
Cro. Jac. 231.

Note; That where a nuisance is done to the land of two tenants in common, they shall join in this action; for it is personal, and concerns the profits of the land.

Cheetham v.
Hampson,
4 Term Rep.
318.

5. Another injury to the land for which this action is maintainable is, *for not keeping the fences in repair*, by which a party is injured.

And such action must be brought against the *occupier of the land*, and will not lie against the owner of the inheritance, *who is not himself in possession*; for the landlord cannot be deemed a wrong-doer for the neglect of his tenant.

Wayne v. Rogers,
2 H. Black. 350.
ante 598.

But if the landlord is bound to repair, in such case the action must be brought against him.

6. "Another injury to the land for which this action lies, is *against a parson or impropiator for not taking away his tithes*, which, by lying on the grafs, rot and destroy it."

But, 1. "A parson or impropiator is not obliged to take away the tithes *till they are all set out*: so that no action will lie till then, except there is a custom to the contrary."

Furneaux v.
Hutchins,
Cowp. 807.

For where the action was brought for not taking away of tithes *by degrees* as cut, the tithes being so set out, grounded on a custom so to take them, it was resolved, 1. That it was not sufficient to establish this mode of tithing, that the former parson, fifty years ago, had so taken the tithes: 2. Nor that such mode *was the custom of adjoining parishes*; though it had been otherwise if it had been the custom of the whole county.

3 Burr. 1892.

2. "Where the tithes are set out, no notice by the common law is necessary; but it is required by the ecclesiastical law: And this notice is often required by custom; in which case it is good."

Butler v.
Heathby,
3 Burr. 1891.

For where this action was brought against the plaintiff, who was impropiator of tithes, for not fetching away the tithes within a reasonable time after being set out, the defendant relied on the custom of the parish, "that notice should be given to the owner of the tithes, of the setting of them out;" which in this case had not been done: the custom was held to be a good and reasonable one; and the defendant had judgment.

Kemp v. File-
wood,
11 East. 358.

And where notice had been given on different days of setting out tithes, which was done, and on a day afterwards, notice given to the parson to take them away within two days or an action would be brought; this was held a good notice to support the action.

Williams v.
Ludner,
8 T. R. 72.

And note, that it was in this case decided, that where tithes have been so set out and the parson neglects to take them away, that the owner of the land could not justify the turning of his cattle into the land so as to destroy the tithe so set out, but should be driven to his action on the case, or to his distress damage feasant.

Carrington v.
Taylor,
11 East, 570.

7. Where a man is possessed of an ancient decoy for taking wild fowl: It was in this case decided, That case lay for firing of a gun so near it that the fowl were disturbed. But the fact of the disturbance being proved, it is matter of evidence to be left to the jury, whether the act was wilful.

These are the most material cases falling under the head of Nuisance. I shall now consider injuries to incorporeal hereditaments under the head,

2. OF DISTURBANCE.

1. Of Disturbance of Ways.

1. "If a person has a right to a private way over the land of another, and that way is obstructed or shut up, the person having such right may maintain for such obstruction an action on the case."

Cantrell v. Church,
1 Cro. Eliz. 84,
3 Burr. 466,
S. P.

And where a man has a grant of an occupation-way over the soil of another, he may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public have used the way without interruption for the last twelve years.

Allen v. Ormond,
3 East, 4.

Under this it will be necessary to consider, 1. How rights of way are acquired: 2. How lost: 3. How proved.

And 1st, How Rights of Way are acquired.

2. A right of way is acquired, 1. By the grant of the owner of the soil: 2. By usage, which presumes a grant: 3. By prescription, which supposes an original grant: 4. By operation of law; as where a man grants a piece of ground in the middle of his field, he tacitly gives a right of way to it, as necessary to its enjoyment, which is called a way of necessity.

Finch's Law 63,
Co. Litt. 56.

As where a man having four closes, sold three of them, and reserved the middle one, without any saving of a way to it, and there was none but over the closes he had sold; it was resolved, that the law reserved to him a right of way to it, over those he had sold, as a way of necessity.

Clarke v. Cogge,
1 Cro. Jac. 170.

1. Of a Right of Way by Grant.

If the way is claimed by grant; that is proved, by production of the deed by which it is granted.

2. Of a Right of Way by Usage.

"Constant and uninterrupted usage of a way, though not going the length of a prescription, shall carry such a presumption of a grant, as to give a good and valid right of way over the lands of another."

Vid. Trustees of Rugby Charity v. Mureweather,
11 East. 375,
in note.

For where in an action for obstructing a way, the plaintiff proved, that one *Fowler* was seised both of plaintiff's tenement and of the defendant's close; and in 1753 had conveyed to the plaintiff the tenement, with all ways therewith used, and that this way had gone with the tenement as far back as memory could go: the defendant produced a subsisting lease for three lives from *Fowler*, made in 1723, by which he demised the field in question in as ample a manner as one *Rack*, a former tenant, had had it; and in this lease there was no exception of a way over the close. Just. *Yates* held, that by the lease, without the reservation of way, the way was gone, and so could not pass under the words *all ways* in the conveyance; but as the defendant's lease had by thirty years preceded the plaintiff's conveyance, and the way had been used all that time, that was sufficient to afford a presumption of a grant or licence from the defendant, so as to

Keymer v. Summers,
Hertsford Summer Assizes, 1767,
Buller N. P. 74.

make it a way lawfully used at the time of the conveyance, and then the words of reference would operate on it, and the way pass.

Campbell v.
Wilson,
3 East, 294.

And *twenty years* adverse possession and enjoyment of a right of way, carries a presumption of a grant sufficient to be left to the jury.

3. Of a Right of Way by Prescription.

Per Lawrence,
Just.
1 Taunt. 286.

" A prescriptive right of way presumes a grant: What the grant was is to be collected from the use which has been made of it, for it is to be presumed that the use has been according to the grant."

Ballard v. Dyson,
1 Taunt. 279.

Therefore a grant of a carriage-way does not always include a drift-way; and where the evidence was of a right of way for carriages, it was held, that it did not establish a right of way for driving cattle.

" Where a way is claimed by prescription, if a grant of it appears, the prescription is necessarily at an end, and mere usage after gives no right."

Rex v. Hudson,
2 Stra. 969.

For where in case for stopping a way, the plaintiff proved it to have been a way as far back as witnesses could remember; but defendant producing a lease made of this way for 56 years, to the intent that it might be a passage during that time, which term had expired *A. D.* 1728, some years before this action was brought; the Chief Justice held, that the leaving the way open for a few years after the term ended, was not sufficient to make it a gift to the public.

2. How Rights of Way may be lost.

Surry v. Pigot.
Litch 153.
Poph. 172.

" Though a person may have a good right of way, yet that shall be destroyed by unity of possession, unless it is a necessary one, and then it shall not."

11 H. 5. 4.
Year-book.
21 E. 3. 2.
2 Shep. Ab. 156.

As if *A.* seized of *Blackacre*, and *C.* of *Whiteacre*, and *A.* has a right of way over *Whiteacre* to *Blackacre*, and *A.* afterwards purchases *Whiteacre*, the right of way is extinct: and if *A.* afterwards enfeoffs another person of *Whiteacre*, the severing of the possession does not restore the right of way, if no reservation or grant is made of it; for a right of way lying in grant, and being once extinct, by grant only can it be revived.

Whalley v.
Thompson.
1 B. & P. 371.

So where one being seized in fee of two adjoining closes *A.* and *B.*, over the former of which a way had been immemorially used to the latter, devised *B.* with the appurtenances. It was resolved, That as the old right of way was extinguished by the unit of seizure in the deviser, no way passed, as nothing but an old easement would pass under the word *appurtenances*.

3. As to how a right of way should be proved.

As there are so many different modes by which a right of way is acquired, the plaintiff must claim it in his declaration according to the true right, and every person is bound to prove his prescriptive right of way as he has laid it.

" As where a person claims a right of way from a place to a place he must prove his prescription over the whole, or it will be bad."

Wright v.
Rattray.
2 East 377.

Therefore where the plaintiff declared for obstructing his right of way from his own close over the defendant's land unto the village of *Allesty*, and in evidence it appeared that he had no right

of way over an intervening meadow adjoining to *Allesty*. It was held that he had failed in his prescription.

2. A second species of disturbance for which this action lies, is for a disturbance of the right of *common*.

But, 1. The ground of this action as far as respects the commoner is, that he is deprived of his common, so that he cannot enjoy it in so ample a manner as he is entitled; and therefore if *the trespass be so small, that the commoner has not any or a trivial loss*, this action will not lie for him; but the lord may have trespass immediately for any injury.

Robert Mary's case.
9 Co. 112.

"But that part of the decision in this case which decides that a commoner cannot have an action for very trivial damage is now not held to be law;"

For in this case, in which former cases were reviewed, it was decided, That where a stranger took dung from off the common, and on an action brought by a commoner for the injury done to the common, and one farthing damages found; the action was held to be maintainable.

Pindar v. Hadsworth,
2 East. 152.

And one commoner may have this action against another for *furcharging*, though he himself has *furcharged* the common.

Hobson v. Todd,
4 T. Rep. 71.

2. The commoner has no property in the soil, for that still remains in the lord, who may exercise any act of ownership which does not detract from the commoner's right of common: as he may put conies on the common, and the commoner cannot destroy them, or fill up their burrows.

1 Burr. 265.
Bellew v. Langdon,
Cro. Eliz. 876.

But if the conies increase so fast and in such numbers as to destroy the common, the commoner can have this action against the lord, on the ground that he cannot enjoy his common in so ample a manner, &c.

Cooper v. Marshall,
1 Burr. 260.

Neither can a commoner justify the cutting down of trees planted by the lord on the waste, though there be not a sufficiency of common left, his remedy *must* be an action on the case or by an assize.

Sadgrove v. Kirby,
6 T. Rep. 483.
1 Bos. & P. 12.

So the lord may dig clay-pits on the common, and empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been immemorially exercised by the lord—for the right of the commoners may be subservient to the lords.

Batefon v. Green,
5 T. Rep. 411.

So the lord may with the *consent of the homage* grant part of the common for building, if he has immemorially used such right.

S. C. in nota.

So the lord or his grantee may inclose part of the common against tenants having common of pasture, notwithstanding they have other rights, as digging sand, &c. provided he leaves sufficient *common of pasture*.

Shakespeare v. Peppin,
6 T. Rep. 741.

But if the lord totally exclude the commoner he may do whatever is necessary to let himself into the common.

Sadgrove v. Kirby, *supra*.

3. Turning an ancient *watercourse* is another injury for which this action lies.

Vernon v. Onodrich,
1 Stra. 5.
Balfon v. Beasland,
1 Camb. 465.

And after twenty years' uninterrupted enjoyment of a spring of water, an absolute right is gained to it, by the occupier of the

close

close from which it issues; and the owner of the adjoining close cannot, by sinking a pit or drain, diminish the quantity.

Bealey v. Sh. w.,
6 East. 208.

Neither can the owner of land, through which a river runs, be enlarging the channel through which the water had been used to flow, vary the quantity as to persons using any of it lower down the stream.

4. A fourth species of disturbance is, that to the right of holding fairs or markets.

The bailiffs et al.
of Tewksbury v.
Bricknell,
2 Taunt. 120.

1. If any one is entitled to toll for goods sold in a market, though that toll is usually taken in bulk, yet if corn *ex. gr.* is sold *by sample*, the seller shall be liable to pay an equivalent toll, as if sold by bulk. For he is benefited by coming to and having the use of the market.

S. C. & Moseley
v. Pierfon,
4 T. Rep. 104.

And in such case the form of action is an action on the case for so fraudulently and injuriously selling by sample to the prejudice of the proprietor of the market.

Holcroft v.
Howell,
1 B. & P. 400.

Twenty years adverse possession of a market gives a presumption of a grant.

2. So if any person is entitled to hold a fair or market, and another person sets up another fair or market so near to the former as to prejudice its custom, this action lies for the injury.

Hale on
F. N. B. 184.

1. "But to support this action, it must appear that the plaintiff's fair or market was the elder one, for otherwise he is himself the wrong-doer."

Braffton, lib. 2.
chap. 24.

2. It is sufficient to make it a disturbance, that the second fair or market is erected *within seven miles* of the former; that is, one third part of a day's journey, reckoned at 20 miles; for so the day being divided into three parts, he has one-third to go, one third to return, and one-third for his business.

3. "So if the second fair or market is held *on the same day* as the former, it is a disturbance; and even if held on a different day it may be a disturbance."

Yard v. Forster,
2 Saund. 173.
1 Lev. 296.
S. C.

As where the plaintiff declared generally that he was seised of a market, and that the defendant had erected another, without a lawful warrant, within seven miles of his market. Exceptio was taken in arrest of judgment, that the plaintiff had not said that it was on the same day; but it was over-ruled, particular it being after a verdict.

Coryton v.
Luthebye,
2 Saund. 115.

5. A fifth species of disturbance is,

"If a man is entitled by prescription to have all the corn of the tenants of a certain manor ground at his mill, this action lies against any of the tenants who carries his corn elsewhere to be ground."

Cort v. Bibbeck,
Lough. 238.

And a custom, "That all the inhabitants, tenants, and residents within the manor shall grind all their corn, grain, and malt which by them or any of them should be used or spent, ground within the manor, and ground at the plaintiff's mill, and not elsewhere," is a good and legal custom: and a bill filed in the Exchequer, wherein the occupier of the mills was plaintiff, and so

the inhabitants, residents within the manor were defendants, in such an issue was directed to try the custom, is good evidence in action on the case.

6. "A sixth species of disturbance for which this action lies: if a man has an ancient *ferry*, and another sets up a new ferry near it, the owner of the first ferry may have his action for the injury, in drawing away his custom." *Bliffett v. Hart*, Mich. 18 G. 2. B. R. Bull. N. P. 76.

For he who has an ancient *ferry* is compellable by law to find boats safe and fit for the purpose; and if he does not, he may be nerced: and as the law therefore imposes such a burden on him, will protect him in the exclusive and uninterrupted enjoyment of such right. And therefore where the law has imposed no such obligation, it gives no such exclusive right. 2 Roll. Ab. 140.

As if a man sets up a new *mill or school* in the neighbourhood of an ancient one, an action will not lie, though a damage may thence accrue to the former mill or school; for such rivalry is of public benefit and advantage, and it is *damnum absq. injuria*. 1 Roll. Ab. 107 Hale on F. N. B. 124.

"But where a ferry is claimed by prescription, the owner shall only have his actions for *direct injuries to his right*."

For where the plaintiff claimed as lessee of the ferry from *Kingston-upon-Hull* to *Barton*, and brought his action for an encroachment on his right; it was proved that the defendant, who was the owner of a market-boat belonging to *Barrow*, a place two miles lower down the river than *Barton*, had at different times ferried persons to *Barton*; that there was a daily ferry between *Kingston* and *Barton*, but that the ferryman was not obliged to provide boats in any place but *Barton*; it was adjudged, that the action would not lie, for the prescription went only to carry persons to *Barton*, and could not be extended to the carrying persons to a different place, unless that was done colourably and fraudulently to prevent the use of the regular ferry, as by landing the passengers within a short distance of the regular ferry. *Tripp v. Frank*, 4 T. Rep. 666.

7. "Another species of disturbance for which this action is given is, if a person having a right to sit in a particular pew in a church, is disturbed therein, his remedy is by action of trespass on the case."

This right to sit in a particular pew of a church arises either from prescription, as appurtenant to a messuage from keeping it in repair, or from a faculty from the ordinary; for in him is the disposition of all the pews, except those claimed by prescription. Gibb. Codex 221.

As therefore the disposition of the pews is *prima facie* in the ordinary, in case of any disturbance in the enjoyment of the pew, the plaintiff must make out his title either against the ordinary or against a wrong-doer, by shewing his title by prescription to the pew, as appurtenant to a messuage, or under a faculty from the ordinary. *Stocks v. Booth*, 1 T. R. p. 428.

But there seems this difference; that where the action is against a stranger for a disturbance, the plaintiff need not state nor prove repairs, it is sufficient to lay his title generally, as appurtenant to a messuage. But where the action is against the ordinary, Kenrick v Taylor, 1 Will. 326.

dinary, he should shew both prescription as appurtenant to a messuage and repairs; for in this case the plaintiff declared on his right to the pew, as appurtenant to an ancient messuage, and that he, &c. had used to repair it, but no repairs were proved; the first was held to be sufficient, the defendant being a stranger.

Stoc v. Booth,
ante.

It was held in this case, that an uninterrupted possession for sixty years would not give a title, if neither a faculty or prescription appears.

Griffith v.
Mathew,
5 T. Rep. 297.

But in this case it was held, that uninterrupted possession for 30 years, unexplained, was presumptive evidence of a prescriptive right to the pew in an action against a wrong doer.

Buxton v.
Bateman,
1 Lev. 71.
1 Sid. 201. S. C.

It seemed in this case, that the declaration ought to state repairs; but that the want of it would be cured by a verdict.

8. Another species of disturbance is to the rights of fishery. For which *vid. ante* Chapter of Trespas.

9. The last species of disturbance which I shall consider, is that of *Offices*.

Earl of Montague v. Lord Preston,
2 Vent. 171.
Harvey v. Newlyn,
Cro. Eliz. 859.

1. If any person has a title to any office, from whence fees or profits are derived, and he is disturbed in that office, he shall have an action on the case for such disturbance.

But the plaintiff in such action must shew that it was an office in fee, and had fees annexed to it; for if an office is not of that nature, there is no injury; and so no action will lie.

Whitechurch v. Paget,
1 Sid. 74.

2. The principals of the several offices belonging to the courts, have not a power of turning out their clerks at pleasure, unless in cases of misbehaviour or misconduct; and in this case an action on the case was adjudged to lie against the defendant, who was *custos breviarum*, at the suit of the plaintiff, who was one of the under-clerks, and turned out of his employment by the defendant his principal, without any sufficient reason or fault.

4. INJURIES TO PERSONAL RIGHTS, NOT PROPERLY REDUCIBLE TO ANY OF THE FOREGOING HEADS.

These injuries may be divided into, 1. Such as affect a man standing in some relation to others: 2. Where there is no relation.

Injuries affecting a man as standing in some relation to others, may be divided into such as affect him in the several relations.

1. Of an husband: 2. Of a father: 3. Of a master.

1. Of Injuries affecting a Man in the Relation of an Husband

1. "If any person entices away the wife of another to live apart from him, without sufficient cause, the husband may have this action for the injury."

Winsmore v. Greenbank,
Mich. 27 G. 2.
C. B.
Bull. N. P. 78.

As where the plaintiff declared that his wife, unlawfully and without his consent, had departed from him and lived apart during which time a considerable real and personal estate had been devised to her, to her sole and separate use, and that thereupon she was desirous of returning, and again cohabiting with him

but that the defendant enticed her, and persuaded her to continue absent; by which means she continued absent till her death, whereby he lost the comfort and society of his wife, and the advantage he ought to have had from such a real and personal estate: after a verdict for the plaintiff, and 3000*l.* damages, it was moved in arrest of judgment, that this was an action *prima impressionis*: but the Court said that every action on the case was in itself a novelty: no action lies without damages, and the *per quod* will not be alone sufficient, except the act done be unlawful: but though a bare enticement will not be sufficient nor actionable, yet the jury, under the direction of the judge, are judges of the legality. And as receiving the servant of another *scienter* is a ground for an action, *à fortiori* it is so in the case of an husband: and injuries that are within the nature of spiritual cognizance, if attended with temporal damages, are actionable.

2. If in consequence of an enormous battery of his wife, or any other bodily injury done to her, the husband is deprived of her society and assistance, he may have a particular action for the injury, and declare for a *per quod servitium amisit*.

Grey v. Livesey.
Cro. Jac. 501.

And the ground of the action being the loss of the wife's company, not the injury to the wife herself, she need not join in the action.

Hyde v. Scyflur.
Cro. Jac. 538.

2. Of Injuries to a Man as standing in the Relation of a Father.

1. An action will lie at the suit of the father for getting his daughter with child.

Tullidge v.
Wade,
3 Will. 18.
Pottlethwayte
v. Parks.
3 Burr. 1878.

But the daughter should be at the time resident in her father's house, or the action will not lie. In this case Lord Mansfield held, that she should be under the age of twenty-one years; but in the case of *Tullidge v. Wade*, it was held to be no objection, the daughter being above that age.

And the point was expressly decided in this case, that the action lay though she was above twenty-one years, and that no contract of hiring need be proved, if she in any way appeared to have acted as a servant.

Bennett v.
Allcott,
2 T. Rep. 166.

But note; This offence is properly sued, not in this action, but in trespass *vi et armis*, the father considering the daughter as his servant, and declaring for an assault with a *per quod servitium amisit*. But the cases are inserted here for the sake of uniformity; and it seems doubtful whether this action would not lie, it being an act unaccompanied with force, and the damages being given for the consequential injury, the loss of reputation, &c. to the family. This was recognized in the case above of *Tullidge v. Wade*, where it was attempted to set aside the verdict for excessive damages.

And *per Buller*, Just. 2 Term. Rep. 167., an action merely for debauching a man's daughter, by which she loses her service, is an action on the case. *Vide* 2 Ld. Raym. 1032.

2. "This action is not confined to the case of natural parents only."

For where the action was brought by the plaintiff for debauching his adopted daughter (the deserted daughter of a brother soldier) brought up by the plaintiff, and damages were given on an inquiry, far beyond the actual loss of service, and the Court refused to set

Irwin v.
Degman,
11 East. 23.

set

set them aside, referring to the case of *Edmonson v. Macbell*, 2 Term. Rep. 4., where an aunt recovered damages under similar circumstances.

Gray v. Jeffries,
Cro. Eliz. 55.

2. A father cannot maintain this action for an *excessive battery of his son*, and the subsequent injuries arising from it, as that he could not marry him as before.

Jones v. Brown,
Esp. N. P.
Cas. 217.

But a father may maintain an action against a person for beating his son, with a "*per quod servitium amisit*." And in such case actual service need not be proved; it is sufficient if the son lived in his father's family.

3. "But the law is now settled that the daughter must be resident in a part of her father's family at the time of the seduction, or the action will not lie."

Dean v. Peal,
5 East. 45.

For where in this case the daughter was only nineteen years of age, was living at the time of her seduction in the house of one Taylor who had married her sister, who was then lately, but under no contract for wages, but without any intention of again returning to her father's house; it was adjudged, that though she actually did return, and was delivered of a child, that the father could maintain no action.

Bedford v.
McKowl,
3 Esp. N. P. C.
119.

In an action on the case for seduction *per quod servitium amisit*, the plaintiff is not confined to proof of loss of service only, but may go into evidence of the loss of comfort in the security of her child and injury to her feelings as a parent.

3. Of Injuries to affect a Man as standing in the Relation of a Master.

Hambleton
v. Vere,
2 Saund. 169.

1. If any person *inveigles away the servant or apprentice of another*, and prevails on him to quit his service, it is an injury for which this action lies.

Anon.
Winch, 51.
F. N. B. 390.

But in such case the person hiring must *have notice*, that the servant was then in the service of another, and not discharged; for otherwise he might hire the servant, ignorant of the circumstances, and so would do no injury, unless after notice he refused to discharge him.

Lightly v.
Clouffon,
1 Taunt. 112.

But where the apprentice has been seduced, though this action may be maintained, the plaintiff (the master) may waive the tort, and bring assumpsit for the wages earned by the apprentice while in the service of the person who seduced him.

Fawcett v.
Beavres,
2 Lev. 68.

2. So it will lie for keeping him after notice.

For it is no excuse for the defendant, who has hired the plaintiff's servant, to say that *he did not entice him away*, but that the servant came away *of his own accord*, and hired with the defendant, if the defendant had notice that the servant had so deserted the plaintiff's service, and yet he still retained him.

B'ake v.
Lanyon,
6 T. Rep. 221.

In this case the same point was resolved as in the last case; and further, That though the second master, (the defendant,) who had ignorantly hired him, (the servant,) on discovering that he was the servant to the plaintiff, desired him to return, but the servant refused, and the second master still retained him. He was held to be liable to this action, for he should have discharged him.

3. A jour-

3. A *journeyman* in any trade is a servant while in the employment of the master-tradesman; and an action lies for enticing him away, even though such journeyman worked only by the piece, and for no certain time.

Aldridge v. Hart. Comp. 54.

4. But where a person was so hired to work at a trade for a limited time, *under a penalty* not to discover the secrets of his master's trade, but having quitted his place, *the master sued him, and recovered the penalty*: this was held to discharge the second master from an action for hiring him, the penalty being deemed full satisfaction for the loss of service.

Bird v. Randall, 3 Burr. 125. 2 Black. Rep. 387. S. C.

5. "In general, if by any injury received from any person, a servant is *disabled in his service*, the master may recover damages for *such loss of service*, by this action."

As if a person digs a ditch in the highway, in which a man's servant falls and breaks a limb, the master may recover in this action for the injury for the loss of service; and so of other injuries of the same kind.

1 Roll. Abr. 89.

But a *public performer at the theatre* is not such a servant to the manager, that the latter can maintain an action for beating him in the case, *per quod servitium amittit*.

Taylor v. Mack, Espin N. P. Cal. 386.

6. It was in this case ruled by Lord *Kenyon*, That a servant could not maintain an action against his master for refusing to give him a character.

Carroll v. Bird, 3 Esp. N. P. C. 201.

1. Of Injuries to Personal Rights which a Person may receive, without Relation to others.

1. "If any person stands candidate for any elective office, and the returning officer *refuses him a poll*, and returns another, trespass on the case lies against such officer."

As where the plaintiff declared that he was candidate for the office of bridge-master within the city of *London*, and that the defendant as mayor should hold the poll, and that he refused a poll to the plaintiff; the plaintiff recovered in this action: and it was further resolved, that it need not be averred in the declaration that the plaintiff would have been elected.

Sterling v. Turner, 3 Lev. 50. 1 Vent. 25. S. C.

2. If a person who is entitled to *vote at any election* for members of parliament, *tenders his vote* to the returning officer, *which he refuses to admit or allow*, he is subject to this action at the suit of the voter. For, per *Holt*, the right of voting is a noble privilege, of which by this means he is deprived.

Ashby v. White, 2alk. 19.

But in order to subject the returning officer to an action for refusing the party's vote at an election, it must be laid and proved to be done maliciously.

Drewe v. Cotton, cited by Lawrence. Just. 1 Inst. 563. Bagg's case. 11 C. D. 99.

3. If any returning officer holds an election, or is called upon to make any return, wherein the right of a third person is concerned, and *he makes a false return* to such writ on such election; as a sheriff of members to parliament, a mayor of a corporation or a *mandamus*, &c. an action on the case in these instances lies against them.

Where

Prideaux v.
Morris,
Balk. 502.

Where the right of a seat in parliament has been decided in favour of the person not returned by the returning officer, or where it could not be decided; as where the parliament was dissolved; an action at common law lies against the returning officer, but not otherwise. N.B. In 1 *Wilf.* 127. Ch. J. *Willes* denied this case to be law. *Sed quare?*

But a farther remedy is now given by statute 7 & 8 *W.* 3. c. 7. which enacts, "That if any sheriff or other officer makes a false return of members to serve in parliament, the party injured (that is, he who should have been returned) shall recover double damages and costs."

Sir Watkins
Wynne v.
Middleton,
1 *Wilf.* 125.
2 *Str.* 227.
S. C.
S. C.
S. C.

1. An action lies in pursuance of this statute in all cases of a false return, not solely where there has been a resolution of the house of commons deciding the right to the seat.

2. The statute is not merely penal, but is also a remedial one; on which ground an amendment was allowed.

3. By the same statute, a return contrary to the last resolution of the house of commons, shall be deemed a false return; and so subjects the officer to this action. And by § 3. a return of more persons than are required by the writ or precept to be chosen, in like manner subjects the returning officer.

2 *Black. Com.*
111. j

4. As to the case of *mandamus*, the return was formerly absolute, and so an absolute injury was done to the party, and therefore this action was given to him for redress; but now by statute 9. *Ann.* c. 20. the party may traverse the return, and is not put to his action.

Bull. N. P. 62.

Note; An action for a false return must be brought either in *Middlesex* where the return is, or in the county from whence it is made.

2. "If the King grants a *Patent* for the sole use of any invention, and the patent be good in law, an action lies against any person for infringing it."

1. "If the action is brought by the patentee, it is incumbent on him to shew, 1st, That the invention was new: 2dly, That the specification is full and complete; that is, such as that the public, after the term of the patent is expired, may have the benefit of, and be able to do without further instructions, the thing for which the patent is granted."

1st, *The invention must be new.*

This is under statute 21 *Jac.* 1. c. 3. which declares all monopolies to be illegal, but allows letters patent for fourteen years for the sole working and making of any manner of *new* manufactures within the realm, to the true and *first* inventor, so as such be not contrary to law, mischievous to the state, by raising the price of commodities at home, hurt of trade, or generally inconvenient.

Edgeberry v.
Stephens,
2 *Balk.* 447.

And as a grant of monopoly or patent may be to the *first* inventor, by stat. 21 *Jac.* 1. c. 3. so if the *invention be new in England*, a patent may be granted, though the thing was *practised beyond sea before*; for the statute speaks of *new manufactures within the realm*; so that if they be new here, it is within the statute; for the act intended to encourage new devices useful to this kingdom,

kingdom, and whether learned by travel or by study, it is the same thing.

"But the *whole of the machine* for which the patent is granted, need not be new."

For where the question was, Whether an *addition* to the old locking-frame was the subject of a patent; Lord *Mansfield* said, that if the general question of law, viz. that there can be *no patent for an addition*, be with the defendant, that was open on the record, and he might move in arrest of judgment, but that that objection would go to repeal almost every patent that ever was granted: there was a verdict for the plaintiff, and 500*l.* damages; which was acquiesced in.

But in such case the patent must not be more extensive than the invention; therefore if the invention consists of an addition or improvement only, and the patent is for the whole machine or manufacture, it is void.

But where a person had obtained a patent for a manufacturing machine, and made a due specification, and afterwards obtained another patent for improvements in which the former patent was recited; and the specification in this, was *of the whole machine* in its improved state, without stating in the specification what the improvements in particular were; the specification was nevertheless held to be good, and to support the patent.

2. "So the *specification must be full and complete in every respect*, as the public are to have the benefit of the discovery at the expiration of the patent."

On a *scire facias* to repeal a patent, four issues were joined on the record: 1st, That the patent was inconvenient to his majesty's subjects in general: 2dly, That the invention at the time of granting the patent was not a new invention as to the public use and exercise of it in *England*: 3dly, That it was not invented and found out by the defendant: 4thly, That the defendant had not by his specification particularly described and ascertained the nature of the invention, or in what manner the work was to be performed. It was laid down by Justice *Buller*, 1st, That a man to entitle himself to the benefit of a patent, must disclose the secret and specify the invention in such a way that others of the same trade, who are artists, may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new addition or invention of their own: 2dly, He must describe it so that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it; and therefore if the specification describes many parts of an instrument or machine, and the patentee himself uses only a few of them, or does not state how they are to be put together and used, the patent is void: 3dly, If the specification be in any part materially false or defective, the patent is against the law, and cannot be supported.

Therefore in a case for infringing the patent for making steel trusses for ruptures, the patentee in the specification omitted what was very material for tempering the steel, which was rubbing it with tallow; Lord *Mansfield* held the patent to be void.

Morris v. Branfon,
Sitt. Westm. B.
1776.
Bull. N. P. 76.

Per Buller Just.
Rex v. Elfe,
Sitt. West.
Mich. 1785.
Bull. N. P. 72.
last edit.

Harmar v. Blaine,
11 East. 101.

Rex v. Arkwright,
Sitt. West.
Trin. 1785.
Bull. N. P. 78.
last edit.

Liardet v. Johnson,
Sitt. Westm.
Hil. 1778
Bull. N. P. 79.

"So

" So if the specification is in any respect *ambiguus* or *unintelligible*, or contains matter not in the thing for which the patent is granted, it is void."

Turner v.
Winter,
1 T Rep. 602.

As where the action was for infringing the plaintiff's patent for making patent-yellow; at the trial three objections were taken to the patent: 1st, That after directing that *lead* should be calcined, it directed another ingredient, namely, *minium* to be taken, which would not answer the purpose, as it did not say whether it was to be calcined or fused, and by reference to the preceding words it would be to be calcined, which would not answer, as fusion was necessary: 2dly, That it directed any kind of fossil-salt to be taken, whereas only one kind of fossil-salt, namely, *sal gem*, would answer the purpose, because it must be a *marine salt*: 3dly, That all the things together did not produce the effect; for that the patent was to do three things, but this produced one only: These were held to be decisive objections to the patent, and that it was void.

Watson v. Pears,
2 Camb. 294.

3. Where the specification of a patent was ordered to be enrolled within a month, the day of the date is exclusive; therefore, where the patent was dated the 10th of May, enrolment on the 10th of June was held good.

Hunt v.
Dewman,
Cro. Jac. 478.

4. This action was adjudged to lie against the defendant, who was the lessee for years, for preventing the plaintiff who had the reversion in fee, from coming on the lands to see if there had been any waste committed, and this though it was not shewn that any waste had been done.

Kinlyside v.
Thornton,
2 Black. Rep.
1111.

Phillybrown v.
Ryland,
1 Stra. 264.

So case in the nature of waste lies against tenant for years, whose term is expired, though there was a *covenant in the lease* not to commit waste.

5. This action lies at the suit of a parishioner, for *excluding him from the vestry-room*; but it must be averred that the parish had a property in the room, and a right to meet there, or otherwise it might be taken to be the defendant's own room, to which he might only admit whom he pleased.

Kettle v. Hunt,
Mich. 27.
Car. 2. C. B.
Bull. N. P. 78.

6. " Where any consequential injury arises to another from a breach of trust, the remedy is by action on the case."

As where the plaintiff declared that he was a wheeler, and possessed of several tools relating to his trade, *viz.* an ax, &c. and by licence of the defendant deposited them in his house; that the defendant had detained them after request for two months, whereby he lost the advantage of his trade for that time; the plaintiff had a verdict; and it was moved in arrest of judgment, that the action should have been trover or detinue: but the Court held the action well brought; for if the plaintiff had his goods again, detinue would be improper; and though a detainer upon request is evidence of conversion, yet it is not a conversion, and the *demand in this case being special*, the action ought to be so too.

" For it is no objection to this action that another will lie for the same offence."

Pitts v. Gaince,
et al.
Salk. 20.

As where the plaintiff declared that he was master of a ship, which, being laden and ready to sail, was seized by the defendants, whereby he lost the profits of his voyage; it was objected that the action should be trespass *vi et armis*; but *per Holt*, the plaintiff

tiff declares not as owner, but as an officer for particular loss, for it in this action he shall recover, though he might have trespass on the possession: but the plaintiff does not declare he tort itself, (the seizing of the ship,) but for the consequential injury, the loss of the voyage.

3. OF THE PLEADINGS AND EVIDENCE.

OF THE PLEADINGS ON THE PART OF THE PLAINTIFF.

“The declaration in this action should state *the particular manner* in which the injury complained of has been committed.”

or where the action was for overloading the plaintiff's horse, whereby he was injured, without shewing how he was overburdened, the declaration was for that held to be bad. Rigg v. Clark,
Cro. Elia. 194.

“Though the declaration goes for a longer time than the injury complained of entitles the plaintiff to a remedy for, yet he is so intitled for *any part* of the time laid, he shall recover accordingly.”

or where the plaintiff declared against the defendant as parson, not taking away his tithes when set out, but suffering them to do the injury of the plaintiff's grass, *from August the 20th day when the grass was cut to the 10th of December* following; though the declaration demanded damages from the time of cutting, it was wrong, as the parson was not obliged to take the grass till it was made into hay; yet for part of the time, the plaintiff having received an injury, he should recover *pro tanto*. Smith v. Jones,
1 Stra. 245.

In declaring on *escapes*, if the party escaped out of custody in prison, and be seen abroad in *Hertfordshire*, the plaintiff may lay the action in *Hertfordshire*. Walker v.
Griffiths,
Mich. 5 Geo. 2.
Bull. N. P. 67.

and if the plaintiff declares for an escape against the defendant as bailiff of a liberty, he ought to shew that the defendant was in execution and return of writs. Miner v. Hinton,
Cro. Car. 329.

In an action for an escape, it must appear that the commitment was of record.”

or where in an action against the marshal, it was laid that the prisoner was brought before Sir *W. Chappel*, one of the justices of our lord the king, and was then committed to the custody of the marshal, at the suit of the plaintiff, on demurrer it was held for it did not appear that the commitment was of record; and in which time he is not in the marshal's custody. Wightman v.
Mullins,
2 Stra. 226.

if an executor brings a *sci. fa.* on a judgment to his testator, and has a judgment on it, whereupon a *ca. sa.* issues, and the defendant being taken, escapes; in the declaration against the defendant, the plaintiff may declare briefly on a *sci. fa.* and judgment thereupon; but if he declares that he sued out a writ without obtaining any judgment, it is an incurable fault. Gold v. Strode,
Carth. 140.

if an administrator may maintain an action in his own name for an escape of a prisoner, who was in execution on a judgment obtained by himself. Boness v.
Walker,
2 Term Rep.
126. 2 Rel.

4. Where

Green v.
Kemet,
1 T. Rep. 656.

4. Where the plaintiff declared against the defendant, *an attorney*, for negligence in not signing a judgment in a cause wherein he had been attorney to the plaintiff, and having set out in his declaration the writ under which the defendant in the original action had been arrested, he misrecited it; it was held to be fatal.

Bastard v.
Bastard,
2 Show. 81.

5. In declaring against a common carrier, it is sufficient to declare in general on the custom and undertaking, without setting out *any sum* which the plaintiff was to have paid for the carriage, but merely stating it "for reasonable hire;" for the carrier may recover on a *quantum meruit*.

9 Co. 113.
Vid. ante, 362.

6. If a *commoner* declares against another person, whether commoner or not, for an *injury to his common*, he should state the offence to be "that his common *tam amplo modo habere potuit sed proficuum suum, inde per totum tempus amisit*"—for such injuries only may he have an action.

Atkinson v.
Teasdale,
3 Will. 278.

And such general declaration for destroying the grass *per quod proficuum*, &c. is good without setting out "that defendant claims a right of common;" for that should be pleaded either by the defendant himself, or given in evidence on the general issue.

3 Will. 290.

But in this action, if *against the lord of the soil*, the declaration should as against him state a surcharge and the particular injury.

Med. 424.

So the plaintiff in his declaration against a stranger need state no title in himself, for possession is sufficient against a wrong-doer; and the disturbance being the gift of the action, and the title only inducement, it cannot be traversed except the defendant sets up a title in himself and justifies; in which case the plaintiff in his replication must set out his title.

Johnson v.
Long,
1 Salk. 10.

7. Where a *nuisance* has been continued after a former recovery in an action for the same, the plaintiff must declare for a continuance of the nuisance; for if he declares barely for a nuisance, the former recovery is a good plea in bar.

8. The plaintiff in declaring for disturbance of an easement, must declare on his title according to the truth, as a variance is fatal in that respect.

Fertiman v.
Smith,
4 East. 10.

As where the plaintiff declared, that he was lawfully possessed of a cotton-mill with the appurtenances, and *that by reason of such his possession he had a right to the water running in a certain tunnel to the mill*. It has ever appeared in evidence, that the defendant had permitted him to lay the tunnel which conveyed the water on the defendant's land, for which he was to pay: but there was no grant or conveyance of it by deed, so that his title to the water was but a mere licence and permission from the defendant. He was nonsuited, for he had not the right to the water by *reason* of his possession of the mill, but by defendant's licence, and so had not declared according to his title.

Anon.
Cro. Car. 499.

But in declaring against the defendant for turning a watercourse, it is good to state it as *an ancient watercourse*, which has been accustomed to run to the plaintiff's mill, without setting out any prescription; for those words are tantamount.

Wherever

Wherever the action is for a *disturbance* to an easement; as where a person claims a watercourse over the lands of another, if the action is *against the tenant of the freehold* for the disturbance, the declaration should shew a right in the plaintiff either from a grant or by prescription; but if it does not appear that the land over which the easement is claimed is the defendant's freehold, it is sufficient in the declaration to state the injury only; but then if the defendant in his plea sets out a right, the plaintiff must not demur, but set out his.

Vernon v.
Goodrich,
1 Stra. 5.

9. In declaring for a disturbance of the plaintiff's *fair*, it is not necessary to set out any title either by grant or prescription.

Dent v. Oliver,
Cro. Jac. 43.

10. Where the declaration charged the plaintiff "that he so negligently drove his cart, that he violently drove against the plaintiff's horse, by which he was killed;" it was held good evidence, that the cart was driven by the defendant's servant, though he was not present when the accident happened.

Brucker v.
Fromont,
6 T. Rep. 659.

In a declaration against the master for an injury done by the servant, stating that he *wilfully* drove against the plaintiff's carriage, it is bad. For, for such injuries *so* done, trespass *vi et armis* is the proper form of action.

Savignac v.
Roome,
6 T. Rep. 125.

So where the declaration stated that the servant *furiously* drove, &c. it was held bad on the same ground.

Day v. Edward,
9 T. Rep. 648.

11. In declaring for deceit in a sale, the *scienter* is matter of substance, where there has been no warranty; but where there has been a warranty, it is surplusage to state a *scienter*; and if so stated in the declaration, need not be proved, for it is surplusage.

Williamson v.
Allison,
2 East, 446.

12. "In this action the day laid in the declaration is not material, provided the plaintiff can prove the injury for which the action is brought to have been committed any time before the bill filed."

As where the plaintiff declared for an injury to an antient ferry of which he was possessed, he had sued out his *latitat* on the 22d of *August*, and declared for the defendant carrying over passengers on the 17th of *August*, but at the trial could not prove the carrying of any persons till the 25th of *September*; and a case being reserved, whether such evidence supported the declaration, being after the time of suing out the *latitat*? the Court held, that evidence of the injury any time before the bill filed, which was in *Michaelmas* term, was good.

Foster v. Bonner,
Cowp. 454.
Bett v. Winding,
7 T. Rep. 4.

13. An action on the case for a nuisance in suffering a spout to be out of repair, whereby the plaintiff's house was damaged, is a local action, and should be proved in the county where laid.

Warren v. Webb,
1 Taunt. 379.

14. "Where either plaintiff or defendant claim any thing by prescription, they may prescribe for less than they are entitled to claim."

As where the plaintiff prescribed generally for toll of all corn and grain brought into the market to be there sold, not being corn sold there *by or to any freeman*. It appeared in evidence, that corn sold by a freeman there was exempt from toll, but not corn sold to a freeman, so that in fact the exemption from toll was more

Bailiffs of
Tewksbury v.
Briknell,
1 Taunt. 142.
Vid. ante, 148.

limited than as stated in the declaration. The evidence was held to support the prescriptive right as laid, it being more extensive than the plaintiff had laid it.

Bushwood
v. Bond,
Cro. Eliz. 722.

So a prescription laid for common for 100 sheep; found to be for 100 sheep and 6 cows: held good.

2. OF THE PLEADINGS ON THE PART OF THE DEFENDANT.

1 Will. 45.

1. "The general issue in this action is not guilty; and upon it the defendant may give in evidence any matter which destroys the plaintiff's action; for the declaration charging a particular injury or offence, *not guilty* denies such injury or offence."

Dunst v. Harding,
9 G. 1. per
Raymond,
Bull. N. P. 78.

As in case for beating plaintiff's servant, *per quod servitium amisit*, defendant upon *not guilty* may give in evidence, that plaintiff *did not lose his service*; for that is the injury charged and denied by not guilty.

2. "So under the general issue, the defendant may give a justification in evidence, for if he is charged with that as an offence which is a lawful act, he is not guilty."

Slater v. Swann,
2 Stra. 872.

As where the trespass laid was for beating the plaintiff's horse, *per quod* he lost the use of him for several days, the defendant pleaded not guilty, and he was allowed to give in evidence that he kept a shop, and that the plaintiff put his horse and cart so directly before the defendant's door, that the customers were prevented from coming to his shop, wherefore he whipped the horse away; and the defendant had a verdict.

3. In the case of escapes, by stat. 8 & 9 W. 3. c. 26. § 26. "The marshal or warden of any prison shall not in any action for an escape against them, give in evidence a re-taking upon fresh suit, *except the same be specially pleaded*; nor shall any special plea be received, unless oath be made in writing by the marshal or warden, and filed, that the prisoner did, without defendant's knowledge, privity, or consent, make such escape."

West v. Eyles,
2 Bl. Rep. 1059.

In an action against the warden or marshall, an affidavit under the statute, that the escape, "if any such escape there was, was without defendant's knowledge," is good with these words.

Sir Ralph Boyer's case,
1 Vent. 211.
Bromsfous v.
Walker,
2 T. Rep. 126.
3 Ref.

If plaintiff in his declaration sets out a voluntary escape, defendant may plead, that he took the party on fresh suit, without traversing the voluntary escape; for the alledging it is nowise necessary to his action, but it should come in the replication: so under a count for a voluntary escape, the plaintiff may give a negligent one in evidence.

Jones v. Pope,
2 Lev. 192.

And note: That actions for escapes being founded in *maleficia* are not within the statute of limitations.

Bull v. Steward,
2 Will. 135

The defendant, in an action for an escape, shall never be improperly plead or give in evidence that the first suit was improperly commenced; for as he could justify under the process, he shall not be allowed to take advantage of any irregularity.

In an action for an escape against the marshal, and he justifies that the prisoner escaped without his knowledge, but after that, that he returned, and that he kept him in custody; he ought to shew that he kept and detained him in custody until the bringing of the action, or until duly otherwise discharged.

Chambers v.
Jones,
11 East, 406.

4. By statute of *West. 2. c. 16*. "A commoner may take in part of the common for a dairy, sheep-cot, or curtilage." It is therefore a good plea to an action against a commoner for inclosing part of the common, that he did it for some of these purposes. But it should appear by the plea that such inclosing was for his own use, or for his servant or shepherd.

Nevil v.
Hamerton,
1 Lev. 61.

5. "Where either party in this action prescribes for an easement, the other cannot set up a contrary prescription without a traverse of that set up by the other."

For where in an action against the defendant for diverting an ancient watercourse, he pleaded that he was seised of two closes, through which the water ran, and that he, and all those whose estate he had, used to water their cattle there in said water, "but that, for convenience of watering, they had a right to dig a ditch near the said watercourse," and so concluded without a traverse: this being a prescription varying the first, was held to be bad without a traverse.

Murgatroid
v. Law,
Carth. 117.

So where the plaintiff declared, that he was entitled by prescription to a fold-course for his sheep in certain lands, and that the defendant had inclosed them, the defendant pleaded a contrary prescription to inclose, and held bad on demurrer for want of a traverse.

Spooner v.
Day & al.
Cro. Car. 432.

6. Where there are several part-owners of a ship, in an action against them on contract, all should be joined; *aliter*, if on a tort, in which case an action will lie against part. *Vide ante*, & C.

Mitchell v.
Tarbutt,
5 T. Rep. 649.

If there are several part-owners, and one only brings an action, the defendant must plead in abatement. (*Addison v. Overend*, 5 T. Rep. 766.) But if he neglects to do so, and the plaintiff recovers, and afterwards another part-owner brings his action, the defendant cannot plead in abatement that the partner who before recovered was a partner.

Sedgeworth v.
Overend,
7 T. Rep. 279.

4. OF THE EVIDENCE.

1. OF THE EVIDENCE ON THE PART OF THE PLAINTIFF.

And, 1st, "In all cases of this action it is necessary that the evidence should so apply to the offence or injury charged, that by no presumption such offence or injury can be supposed to arise from any other cause."

For where the plaintiff declared, that the defendant, in giving evidence in an action between the plaintiff and another person, had used words in derogation of the plaintiff's character, whereby the jury gave him but small damages in that action; this action was held not to lie, for it could not appear

Harding v.
Bodman,
Hutt. 11.

pear how the jury were influenced in their verdict by those words.

2. "In trespass on the case, all *material averments* only are put "in issue, and nothing more; and these only are required to be "proved."

Winn v. Walker,
2 Black. Rep.
840.

Therefore where the plaintiff in an action against his tenant of certain lands, for leaving them out of tenantable repair, declared, first as *seised in fee*, and it was proved that he was only *tenant in tail*, yet it was held not to be a material variance, because that the lease of tenant in tail is not void, but voidable only by the issue in tail, and could not be avoided during the lessor's life. 2d, Where he declared "that the tenant had undertaken to leave it "in tenantable repair," and it was proved to be, "to leave it in "good repair as the tenant found it;" it was held not to be a variance, the land being proved to be in tenantable repair when the tenant entered.

"For this action, being in its nature transitory, material averments only are put in issue."

Drewry v.
Twiss,
4 T. Rep. 558.

Therefore in case for negligence in running down the plaintiff's boat, near the half-way reach in the river *Thames*, the evidence proved it to have been done in the half-way reach: this was adjudged not to be a material variance.

Frith v. Gray,
H. 7 G. 3.
quot. per Grose,
Just.
4 T. Rep. 561.

So where the action was on an agreement to procure the plaintiff a booth at a horse-race on *Barnet Common*; the declaration stated *Barnet Common* to be in the county of *Middlesex*; in evidence it was proved that the whole of *Barnet Common* was in *Hertfordshire*; and the objection of a variance being taken, Lord *Mansfield* and the rest of the Court (on a motion for a new trial) held, that the gift of the agreement being to procure the plaintiff a booth at *Barnet Common*, it was immaterial whether it was in *Middlesex* or *Hertfordshire*, and so that the words might be rejected in the declaration.

Burbege v.
Jaques,
1 B. & P. 225.

So in an action on the case for raising the foot-path on each side of plaintiff's house, which caused a nuisance, the declaration stated, that the plaintiff was possessed of a house at *Sheernefs*, in the county of *Kent*. At the trial it appeared that the house was situated in the parish of *Minster*, which is contiguous to *Sheernefs*; that *Sheernefs* was extra-parochial, but that both places usually went by the name of *Sheernefs*: it was held, that as the declaration did not state the house to be in the parish of *Sheernefs*, it was no variance.

Gunter v.
Clayton,
2 Lev. 85.
Alexander v.
Macaulay,
1 T. Rep. 611.
Decided on the
authority of the
above case.

3. In escapes, if the plaintiff declares that he had a good cause of action against *J. S.* and sued out a *latitat* against him, and that the defendant arrested him, and suffered him to escape, he must prove a cause of action, or he will be non-suited, though the cause of action need not be for the same sum mentioned in the declaration; but if the declaration be of a *latitat* in a plea of trespass, and the writ produced be of a plea of trespass *et etiam billæ 20l.*, it will not support the declaration.

Tildar v. Sutton,
Pasch. 2 And.
per Holt, John-

2. Plaintiff in an action for an escape need neither produce the *ca. sa.* nor the copy of it, but the return is sufficient; neither need the

the *ca. fa.* be set forth in the declaration. But if it be set forth with a *scilicet* that issued such a day, it may be doubtful whether he ought not to prove the *ca. fa.* with a true teste; otherwise, against the sheriff the warrant to the bailiff is sufficient evidence, though it would not be so for him.

3. To prove a voluntary escape, the party escaping may be a witness; for it is a matter of secrecy between him and the gaoler.

So is the confession of the under-sheriff good evidence to charge the sheriff, for in effect it charges himself.

In an action against the sheriff for an escape, the return of *non est inventus* on the writ is sufficient proof of the delivery of the writ to the sheriff, and the bailiff's name indorsed is sufficient proof that a warrant was directed to him.

In such action it is not necessary to aver, that the writ was indorsed by virtue of an affidavit *now on record*, nor to produce the affidavit; but if reference be so made to it in the declaration, the affidavit must be produced.

But in actions against the sheriff for misconduct in his office, where the act has been done by his bailiff, it is not enough to prove the officer to be a known bailiff, &c. and to prove a copy of the warrant under which he committed the act for which the action is brought; the plaintiff must establish a privity between the sheriff and the officer, by proving the original warrant of execution from the sheriff to the officer, or at least by giving notice to produce it, and then proving its contents by secondary evidence.

4. If the action is brought for a *rescue*, the plaintiff must prove,
1. The original cause of action: 2. The writ and warrant, which must be by producing sworn copies: 3. The arrest, to shew that it is legal: 4. In point of damages it is expedient to prove, that the person arrested has become insolvent, or is not to be found; but this is not *necessary* to support the action; for the defendant having been guilty of a breach of the law, shall find no favour.

5. In an action against a sheriff for a false return to a writ of *ex. fa.* it is necessary for the plaintiff to prove the real existence of his debt upon which the writ issued; but proof of an acknowledgment by the defendant that he was so indebted to the plaintiff, is sufficient.

5. In an action against the master for an injury done by the servant, the servant is an inadmissible witness unless he shews a release from his master; for if the plaintiff recovers against the master, the servant is liable over to him for his own misconduct; and if the plaintiff fails against the master, he may sue the servant, so that either way he is *interested*.

So where the action was against the master for negligence in the servant, who was a turncock to the defendants, in not stopping a pipe, by the bursting of which the plaintiff's horse received an injury; the servant was called as a witness, but was objected to as incompetent without a release, as he came to disprove his own negligence, which, if established by the verdict, would be a

son v. Gibbs, per Holt, at Exon. Bull. N. P. 66.

Rex v. Ford, 2 Salk. 690.

Ld. Raym. 190.

Blatch v. Archer, Cowp. 63.
Vide McNeal v. Perchard, Espin. N. P. Cas. 263.

Wibb v. Hearne, 1 B. & C. 281.

Drake v. Sykes, 7 T. Rep. 113.

Wilson v. Geary, 6 Mod. 211.

Kempland v. Macaulay, Peake's N. P. C. 65.

Jarvis v. Hayes, 2 Stra. 1083.

Green v. New River Company, 4 T. Rep. 589.

ground of action against himself by his employers; and he was rejected on that ground: for the verdict which the plaintiff would obtain against his masters, might be given in evidence in an action by them against him, to ascertain the quantum of the damage, though not as to the fact of the injury, that he being therefore interested to diminish those damages, was an incompetent witness.

"But where the injury is done in the master's company, and not by the servant alone, there he is a good witness."

Bull. N. P. 77.

Therefore in an action against the master, for that by the negligently managing his barge he had run down that of the plaintiff, *Lee Ch. Just.* examined all the men to prove no neglect, the master himself being then asleep in the cabin.

"But where the action is by the master for an injury done to the servant, with a *per quod servit. amisit*, there the servant may be in evidence, (though the case of *Dunfley v. Webb*, 1 *Str.* 414. is *contra*,) from the authority of the following cases."

Duel v. Harding,
1 *Str.* 595

The servant beaten was in this case allowed to be a good witness on an action brought by the master.

Lewis v. Fogg,
2 *Str.* 944

So in an action for defendant's dog having bit the plaintiff's apprentice, *per quod servit. amisit*, the apprentice was admitted as a witness.

Cock v. Watham,
2 *Str.* 1054

So where the action was for debauching the plaintiff's daughter, the daughter was examined as a witness.

This was admitted in the case of *Reddie v. Scoolt*, *Peake's N.P. Caf.* 241.

For in these actions the servant is no way interested in the event, the action being given to the master, not for the injury, but for the consequences of the injury.

Per Holt, at
Ho. Cham,
13 *W. 3*.
Bull. N. P. 73.

6. In an action against a carrier, the plaintiff ought to prove that the defendant used to carry goods for hire, and that the goods were delivered to him or his servant to be carried; and if a price be alleged in the declaration, it ought to be proved to be the usual price of such a stage, but there needs no proof of a price certain; and if a price be proved, there needs no proof that defendant is a common carrier, *for every one carrying for hire is deemed in law to be a common carrier.*

Moore v. Wilton,
1 *T. Rep.* 659.

So where the plaintiff declared against the carrier, on his undertaking to carry for a certain price to be paid by the *confignor*, and on evidence it appeared that it was to have been paid by the *confignee*, it was held to support the declaration.

"Where the question turns upon whether the goods were delivered to the carrier or not, this case has been decided as to the competency of the person delivering them being witnesses."

Davies v. Phillips,
G. Hall. Sitt.
Hil. 16 G. 3.
MSS.

In an action against a carrier for the loss of goods delivered the inn-yard, the defence was that they were never delivered there or if so, that it was to a sharper who had gone off with them to prove the delivery, the plaintiff called the person from whom he had bought the goods, and who had delivered them at the

inn; he was objected to, because if the plaintiff did not recover in this action, and the goods were not properly delivered, he would be liable to the plaintiff: to this it was answered, that the plaintiff having adopted the delivery, could never after call on the witness: but *per Lord Mansfield*, the question is, Were the goods delivered at the inn, or not? if they were not properly delivered, or embezzled by the witness's servants, in either case he is liable to the plaintiff, therefore he is interested and inadmissible.

7. "In questions concerning a right of common, one commoner cannot be a witness for another as to the general right."

So where the action was by a commoner, against the defendant, whose close joined the common, for not repairing the fences, by which the cattle escaped; and charging the defendant to be liable to do such repairs, and the defendant's right of common was by prescription as appurtenant to an ancient messuage. Other commoners claiming by similar titles, were held to be inadmissible witnesses, for it might be beneficial to them, that the defendant should so keep up the fences, as they claimed a right to turn in their cattle on the common.

Anfcomb v. Shore,
1 Taunt. 261.

If the plaintiff's action is for a surcharge of his common, he need not shew that he had actually turned any cattle on the common at the time of the surcharge laid; it is sufficient to shew that by the number turned in by defendant, he could not have enjoyed his common in so ample a manner as he was entitled.

Wells v. Watling,
2 Bl. Rep. 1233.

And in such case it is no defence to the action that the plaintiff himself had surcharged the common, for that is a tort for which he is himself liable to an action; and one tort cannot be set off against another.

Hobson v. Ford,
4 T. Rep. 71.

8. If the action is for disturbing the plaintiff in taking the profits of an office, it is sufficient to prove the value, *communibus annis*, not every particular sum received.

Lord Montague v. Lord Preston,
1 Vent. 171.

If plaintiff claim a right as belonging to his manor, as here the appointment of a sexton, and it appears that the manor had ceased to be a legal one for want of freehold tenants; still it may subsist for other purposes, and be a manor by reputation sufficient for the purposes stated in the pleadings.

Sosne v. Ireland,
10 East, 259.

2. OF THE EVIDENCE ON THE PART OF THE DEFENDANT.

1. In the case of escapes, the gaoler or officer can take no advantage of the error in the process; and so if he pleads no escape, it seems he shall not be allowed to give in evidence that there was no arrest; for the plea admits the arrest.

Rex v. Fell,
1 Salk. 272.

2. In cases of rescue, the defendant may give in evidence, in mitigation of damages, the ability of the person rescued, and that he is still amenable to justice; yet if the jury give the whole debt in damages, no new trial will be granted. And in this case the party rescued may be an evidence, and though *particeps criminis*, if the defendant be guilty, yet shall this only go to his credit, not to his competence.

Wilson v. Geary,
Mod. 211.

3. In an action for a *false return of non est inventus* on mesne process, the sheriff's bailiff is an inadmissible witness to prove an

Powel v. Hord,
1 Stra. 649.

endeavour

endeavour to execute the writ, for he has given security to the sheriff, so that it is his own cause in effect.

Scholes v.
Hargreaves,
5 T. Rep. 46.

In an action for surcharge of common, the plaintiff must claim his right of common by prescription for cattle levant and couchant, as *appurtenant to land or curtilage*; for where he claimed it as appurtenant to a *messuage*, it was held to be bad; for to an house only, common cannot be appurtenant.

Dunstan v.
Tresider,
5 T. Rep. 2.

Where to an action of trespass defendant pleads a custom for all the customary tenants to have a right of common, and then claims title as tenant of such customary tenement, and the replication traverses the custom; the plaintiff may, *on this issue*, prove that the messuage was built within twenty years, and not upon the site of an ancient messuage.

5. THE VERDICT, JUDGMENT, AND COSTS.

1. It seems a general description of the verdict in this action, that if the substance of the issue is found it is sufficient.

King v.
Andrews,
Cro. Jac. 380.

As where in an escape the plaintiff declared on a taking by the defendant, the then sheriff, and it appeared that he had been taken by a former sheriff, but *handed over in custody* to the defendant, the issue was held to be well found.

Oates v. Machin,
1 Stra. 595.

So where the declaration in escape alleged that the prisoner was surrendered at the justice's chambers in the parish of *St. Bride*, and it was found to be in *St. Dunstan's*, it was yet held to be good.

Ferror v.
Johnson,
Cro. Eliz. 33.

So where in a case for disturbing the plaintiff in an office, he made a special title, and the jury found a title variant from that so set out, yet the plaintiff had judgment.

Gravenor
v. Meers,
Cro. Eliz. 384.

And lastly, In a case on the sale and warranty of *two oxen*, and the jury found a verdict as to the sale of *one*; on the variance alleged, the Court over-ruled it, for the action was on the *deceit*, not on the warranty.

Powel v. Hord,
1 Stra. 649.

2. In an action against the sheriff for a false return on mesne process, the jury may give the whole debt in damages.

OF THE COSTS.

By stat. 2 *W. & M. c. 5*. "Treble costs and damages are given against a person guilty of a rescous of a distress."

Lawson v. Storie,
Salk. 205.

If plaintiff brings a case on this rescous, which he might do by common law, he shall recover treble costs as well as treble damages.

PART THE SECOND.

CHAPTER I.

Of Writs of Mandamus.

THE Writ of Mandamus is a prerogative writ, issuing out of the Court of *King's Bench*, by virtue of that general superintendency which that court possesses over all inferior jurisdictions and persons. It is the proper remedy to enforce obedience to acts of parliament and the King's charters: to prevent disorders from a failure of justice and defect of police: every subject is entitled to it on a proper case shewn to the Court, and it ought in all cases to be granted where the law has provided no specific remedy, and wherein by justice and good government there ought to be one.

Per Lord Mansfield,
3 Burr. 1267.

Writs of mandamus, as far as respects corporations, according to their object, are either to restore a person deprived of some corporate, or other franchise or right, or to admit a person legally entitled to the same rights.

In treating of the proceedings under this writ, I shall, 1st, Consider for what the Court will grant a mandamus: 2dly, For what the Court will not grant a mandamus: 3dly, The proceedings in granting it: 4th, Of the writ itself: 5th, Of the proceedings under the stat. 9 Ann. 26.

1. FOR WHAT THE COURT WILL GRANT A MANDAMUS.

1. A Mandamus lies to admit or restore Persons to every Description of Corporate Offices.

As mayor, burghers, common-council man, recorder, town-clerk, aldermen, bailiff, and such offices as are part of or belong to corporations.

Raym. 432.
1 Sid. 14.
5 Mod. 257.
Stil. 32.
2 Roll. Ab. 455.

4 Burr. 1999. 1 Vent. 77. Poph. 176. Cro. Jac. 506. Stil. 355. 32 Bulst. 122. 1 Vent. 19.

2. It lies to the Officers of Corporations to do certain Acts connected with their Duty as Corporators.

As to admit persons to offices in the corporation: To admit those having right to their freedom: To call a corporate meeting: To

1 Lev. 91.
Raym. 69.
4 Mod. 368.

Stil. 299. To hold corporate elections: To the steward of the borough to attend with the corporation-books, &c.
 1 Burr. 117.
 1 Stra. 2457.
 2 Stra. 1003. 2 Stra. 1080. 1 Stra. 578. 2 Stra. 948.

3. To admit or restore Persons claiming Rights or Appointments in Colleges or Corporations of such public Erection.

Raym. 101, 31. As master or fellow of a college, fellow of the college of physicians, &c.
 1 Mod. 82.
 1 Sid. 29.
 Cont. Garth. 92.

Or calling upon Persons having Authority, to execute their proper Duties in such Colleges, or to do certain Acts belonging to their Appointments.

Cowp. 577. As to the warden of a college to put the college seal to an answer in Chancery: To the chancellor of an university to restore a person to degrees: to the keepers of the university seal, to put it to the appointment of high steward: To restore an under-school-master to a school of royal foundation, &c.
 1 Stra. 557.
 2 Ld. Raym. 1334.
 3 Burr. 1647.
 1 Stra. 58.

4. To admit or restore Persons claiming Rights or Offices belonging to any inferior or Ecclesiastical Court.

1 Sid. 94. 152. As attorney to the Marshalsea Court: Steward of courts leet: Clerk of the peace: Registrar of the Ecclesiastical Courts, &c.
 2 Lev. 75.
 Raym. 56.
 1 Sid. 40. Show. 289. Mod. Caf. 18.

Or to Persons having Authority therein to do all legal Acts connected with their Duties and Offices.

2 Roll. Rep. 82. As to the lord of the leet to administer the oaths to the por-
 85. treeve: To compel the tenants of the manor to attend at the court
 2 Stra. 1207. leet to make a jury: To the steward and homage of a manor to
 1 Will. 283. hold a court, and present purchasers of burgage tenements: To
 1 Stra. 113. the judge of an inferior court to proceed to judgment on a ver-
 Raym. 234. dict: To the judge of the ecclesiastical court to grant probate of
 1 Vent. 335. a will or administration to whom it belongs: To the spiritual
 1 Sid. 281. court to administer the oath to one elected churchwarden: To the
 1 Lev. 186. spiritual court to absolve an excommunicated person, &c.
 1 Stra. 552.
 1 Vent. 115.
 Raym. 439.
 Cal. temp. Hardw. 130. 4 Burr. 2295. 2 Roll. Rep. 107.

5. To admit or restore Persons to Benefices or Dignities in the Church, or other Places of Ecclesiastical Function, or to do Acts connected with their Offices.

2 Stra. 798. As to the warden of a college to admit a chaplain: To restore
 3 Burr. 1265. a preacher: To admit, institute, and induct into a canonry or
 2 Stra. 1082. prebend: To admit a parish clerk: To restore a sexton: To swear
 1 Stra. 159. in a churchwarden: To try the right of officiating in chapels, by
 Cowp. 412. admitting
 Cowp. 370.
 3 Burr. 1420.

admitting a person to the curacy : To trustees of an endowed meeting-house, To admit one as pastor to the use of the pulpit. To admit a vestry clerk, &c.

2 Burr. 1043.
3 Burr. 1265.
Rex v. Church-
wardens of
Croydon.

6. To admit or restore Persons claiming the Freedom of or Offices in any Public Company, or to do Acts connected with them.

As director of the Amicable Assurance Company : A quaker to the freedom of the *Turkey* Company : Yeoman of the wood wharf to the corporation of *London* : Ale-taster : To the clerk of the company to hand over the company's books on his being removed, &c.

1 Stra. 696.
2 Burr. 1000.
2 Stra. 832.
1 Stra. 608.
2 Stra. 879.

7. To Justices of the Peace, to carry into Execution the several Statutes under which they are empowered to act.

As to make convictions : To register a meeting-house : To swear an overseer to his accounts : To grant warrants to levy the balances of old overseers accounts : To make a warrant of distress for a poor's rate : To appoint overseers to a new township or hamlet : To allow constables their charges in providing carriages for the king's forces : To sign poor's rates : To swear in overseers of the highways, or to make a rate to reimburse such surveyors of the highways : To proceed to judgment on a seizure : To take articles of surety of the peace : To receive an appeal, &c.

128. 4 Burr. 2452. 1 Stra. 211. 1 Stra. 530. 2 Stra. 835. Bull. N.P. 213.

8. To compel Corporations to proceed to Election under stat. 11 Geo. 1. c. 4. s. 2.

Under this head it is to be observed, that the writ of mandamus being for the purpose of enforcing obedience to charters, when the election was ordered to be holden on a certain day, if that day was past, a mandamus could not order the election to be holden on another day, for that would not enforce, but be inconsistent with the charter : it was therefore necessary to preserve the corporations to remedy that evil ; and it was therefore enacted by that stat. " That if no election should be had of the mayor, or " other chief officer on the charter-day, that the corporation " should not for that be dissolved, but might meet at the town- " hall the day after, and proceed to election ; and if no elec- " tion was made on the charter-day, or in pursuance of that act, " or being made, should after become void, that the Court of " *K. B.* might grant a mandamus, requiring an election to be " made."

Under this statute it has been held,

1. That where there was a mayor *elected and sworn into the* *Cafe of Boffiney,* *alias Tintagel,* *office,* the Court notwithstanding granted a mandamus, it appear-
ing 2 Stra. 1003.

Case of Aberyst-
with, 2 Stra.
1157. S. P.

Rex v. Mayor,
Bailiffs, and
Burgesses of
Cambridge,
4 Burr. 2008.

Rex v. Banks,
3 Burr. 1452-
and cas. ibid.
Vide Rex v.
Mayor of Col-
chester,
2 T. Rep. 259.

Case of Corpora-
tion of Oxford,
Bull. N. P. 201.
Case of Corpo-
ration of Scar-
boxough,
2 Stra. 1180.

Rex v. Edyvean
and Spiller,
3 T. Rep. 352.

ing that the election was *merely colourable*; for the intent of the act was to give the corporation a rightful officer, whereas this pre-
tence would waste the whole year, though the Court might refuse
it if there was a probable election.

So where the corporation elected for mayor an officer of the
army just gone to *America*, and not likely to return within the
year,* and that known to the electors at the time of the election,
the Court held this to be clearly a colourable election, and granted
a mandamus to proceed to the election of another.

But in such case, where the officer is in possession, the election
must appear to be clearly colourable, and the mayor, or officer *de*
facto, must be made a party to the rule.

2. "The power given by this statute is limited to no time."

For the Court have granted a mandamus to proceed to the elec-
tion of a mayor, where there has been no legal mayor for four
preceding years.

3. The statute is not confined to the election of the head officer
of the corporation only, but the Court will order, under the
statute, the corporation to proceed to the election of the inferior
and constituent officers of the corporation.

4. Under the statute, public notice in writing of the election
is to be fixed in some public place in the borough: and where a
mandamus was granted to elect a mayor for the borough of *Bol-
min*, and a rule made that public notice should be affixed in the
market-place, which was done; the Court granted an attachment
against the defendants for not attending, (their presence being
necessary to the election,) though they had only *been served with a*
copy of the rule, but not with the mandamus, or with the original
rule.

These are the principal cases in which a mandamus will be
granted; but as its object is to provide for every defect of justice,
and the relief it gives of general extent, how far the Court will go
in granting this writ, will better appear by considering,

2. FOR WHAT THE COURT WILL NOT GRANT A MANDAMUS.

1. "The Court will not grant a mandamus to a person to
"any act whatever, where it is doubtful whether he has by law
"right to do such act or not; for such would be to render the pro-
"cesses of the Court nugatory; as if the person had no right, he
"might so return it."

Rex v. Bishop
of Ely,
1 Will. 266.

As where the application was to the Court for a mandamus
be directed to the bishop of *Ely*, commanding him to *hear an ap-
peal as visitor of Trinity College, Cambridge*, made on an affidavit
that the bishop had declined hearing the appeal till he was satis-
fied that he was visitor; on shewing cause it appeared not clear
to the Court that the bishop was visitor, and in fact that he ha-
never exercised that right, the Court therefore refused the man-
damus; for the Court will not grant a mandamus to compel an
perfect

person to exercise a jurisdiction which that person is not most certainly and clearly appointed to, and bound by law to exercise.

So where the application was for a mandamus to the churchwardens of *St. Botolph's, Bishopsgate*, commanding them to call a vestry in Easter week, to elect new churchwardens; it was refused, as there was no instance of such a mandamus; and the Court could not take notice who had a right to call a vestry, and consequently did not know to whom it should be directed.

Anon.
1 Stra. 686.

2. "The Court will not grant a mandamus where the office claimed is not of a certain permanent nature, nor where it cannot give a complete remedy."

As where the motion was for a mandamus to the bishop of London, to license the Rev. Mr. Dawney, to preach as lecturer of *St. Ann, Westminster*; but it appearing that the lectureship was not endowed, but depended on the voluntary subscriptions of the inhabitants, the Court held the office to be of such a nature that it would not interpose.

Rex v. Bishop of London,
1 Will. 11.

And in this case which was for a mandamus to the bishop, to license a lecturer to *St. Luke, Chelsea*, the same objection as in the last case was taken and allowed; and beside, that unless there was an endowment or immemorial custom to appoint a lecturer without the consent of the rector, that it would be nugatory to grant a mandamus to the bishop, as the rector might refuse the use of his pulpit to the person licensed or maintain trespass against him in case he used it, the freehold being in the rector; so that the mandamus could not give the party complaining complete redress.

Rex v. Bishop of London,
1 T. Rep. 331.
Rex v. Field & alt.
4 T. Rep. 125.
S. P.

"But it is not necessary, in order to induce the Court to interfere by mandamus that the office is of a freehold nature; it is sufficient that it is an annual office, and has fees annexed."

This was the doctrine held by the Court in this case, which was an application to the Court for a mandamus to the defendants, to proceed to the election of a clerk, and which was opposed, on the ground that the office was not of such a nature as would induce the Court to interfere; but the mandamus was granted, the clerk being entitled to certain poundage fees under the statute, which are granted to him by an annual warrant from the commissioners.

Rex v. Commissioners of the Land Tax of St. George in the Fields,
1 T. Rep. 146.

"But where the office is of a mere private nature, the Court will not grant a mandamus."

Upon which ground the Court refused a mandamus to restore a person to the place of steward of a court baron; but it will be granted to restore a person to the office of steward of a court leet, because that concerns the administration of justice.

Stamp's case,
1 Sid. 40.
Vid S. P.
1 Vent. 143.
Mod. Caf. 18.

"But in all cases of public concern, or of offices of a public nature, the Court will grant a mandamus."

As to swear in a director of the *Amicable Assurance Company*, which is a company created by charter from the crown; so to compel an admission into a trading company.

Anon.
1 Stra. 696.
Rex v. March, Governor of the Turkey Company,
2 Burr. 1000.

3. "The Court will not grant a mandamus where there is any other specific legal remedy by which the person complaining may obtain redress."

There-

Rex v. Governor and Company of the Bank of England, Dougl. 506.

Rex v. Street & al. Mod. Caf. 98.

Rex v. Mayor of Colchester, 2 T. Rep. 259.
Vide S. P. Rex v. Bishop of Chester, 1 T. Rep. 396. *Vid.*
Rex v. Guardian to the Poor in Canterbury, 1 Black. 667.

Rex v. Benchers of Gray's Inn, Doug. 339.

Rex v. W. Briftow, 6 T. Rep. 168.

Rex v. Company of Free Fishermen and Dredgers of Whitstable, 7 East, 353.

Rex v. Bishop of Chester, 1 Will. 206.

Rex v. Bishop of Ely, 2 T. Rep. 290.

Rex v. Bishop of Chester, 2 Sra. 798.

Therefore in application for a mandamus to the Bank, to compel them to transfer stock, the Court refused it, because *the party had a remedy by action on the case*, if they refused.

So where the application was for a mandamus to be directed to the old churchwardens to hand over the parish books to the new ones, the Court refused it; for *they might have a right to keep them*, and that right might be tried by an issue at law.

So where the application was for a mandamus to be directed to the mayor of Colchester to admit Mr. Grimwood to the office of recorder, on the ground that the mayor admitted several illegal votes for Mr. Smithies who had been admitted and sworn in, and had rejected several legal ones of Mr. Grimwood's, the Court refused it, on the ground that *the remedy was by quo warranto* to set aside the election of Smithies, he being in possession of the office.

So the Court refused a mandamus to the benchers of an inn of court, commanding them to call a person to the bar; for the proper remedy in such a case *is by appeal to the twelve judges*.

So the Court refused a mandamus to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; because there was a remedy by indictment in case he refused to obey such order.

So in this case the Court refused a mandamus to restore a corporator, entitled as such to certain profits, *who was suspended* until he paid a fine imposed on him under a bye-law; for he was still an officer, and might have his remedy by action for the cost in disturbing him, as in equity for his share of the profits.

4. "Wherever a controuling power, or *power of appeal is exclusively lodged in any person or corporation*, the Court will not grant a mandamus: this is the case of *visitors of colleges*, or others of spiritual foundation."

For the acts of a visitor cannot be questioned in any court of law.

"But this is the case only where the visitor is acting within *his visitatorial power*."

For where the bishop of Ely was visitor of Peterhouse College, and by the statutes of that college the fellows are to *return two to the visitor, who is to appoint one* to be master of the college on a vacancy; and the fellows having returned two, *the bishop appointed neither*, but nominated another person to be master; it was held by the Court that his power was restrained and limited in this particular under the statutes, and that therefore the Court could compel him to act within his authority, and accordingly made the rule absolute for a mandamus to him, *to admit one of the two so returned to him by the fellows*.

So where the Bishop of Chester was visitor of Manchester College, and he *accepted the place of warden*, it was held, that his visitatorial power was suspended, and that a mandamus might go to him in his other capacity as warden.

5. "So the Court will compel a visitor *to act as such*, though *they will not interfere with his decision*."

As

As where a mandamus was prayed to the Bishop of *Lincoln* as visitor of *Lincoln College, Oxford*, to receive, hear, and determine an appeal of *Dr. Halifax*, who complained of an undue election to the rectorship of that college; the Court held, that where the statutes have appointed a visitor, who is to interpret the statutes of a college, and an appeal is lodged with him, the Court will compel him to hear the parties, and come to some decision, though they will not oblige him to go into the merits; for it is sufficient if he decides that the appeal comes too late.

Rex v. Bishop of Lincoln, Trin. 25 G. 3. Cit. 2 T. Rep. 338.

6. "Where any other court has competent jurisdiction, the Court will not interfere by mandamus to control it."

Therefore where the validity of a will is contesting in the spiritual court, and a suit then depending there concerning it, the Court will not grant a mandamus to the judge of such court to grant a probate to any particular person: so the Court will not grant a mandamus to the judge of the ecclesiastical court to grant administration *durante minore etate*, for the law has not decided who is entitled to such administration; but in the case of a common administration, the next of kin being entitled to it by law, a mandamus may go to that effect.

Rex v. Dr. Hay, 4 Burr. 2295.

Smyth's case, 2 Stra. 892.

Vid. Rex v. Dr. Hay, 1 Black. 640.

So it will not lie to admit a proctor into the spiritual court, for that court has jurisdiction over its own officers.

3 Lev. 309.
3 Med. 332.
Show. 217. 251.
Skin. 290.
Carth. 160.

7. "The Court will not grant a mandamus to a person, commanding him to do any thing which he is not under a legal necessity of doing; that is, if the law has left a discretion in him, the Court will not control it."

As where the application was for a mandamus to be directed to the justices of peace, to compel them to grant a licence to *Giles* to keep an ale-house, it was refused; for it is discretionary in the justices to grant or to refuse it.

John Giles's case, 2 Stra. 881.

So where under a stat. 8 Geo. 3. for an inland navigation to *Birmingham*, commissioners were empowered to make a cut or canal from a place called *Newhall Ring*, near *Birmingham*, and from such other places near the town as might be found convenient; the commissioners had begun a cut in another direction, and this application was to compel them to make a cut to *Newhall Ring*; but it was refused, for the act only gives an authority to the commissioners to proceed, not a command: they may desert or suspend the whole work, and *a fortiori* any part of it.

Rex v. Proprietors of the Birmingham Canal Navigation, 2 Bl. Rep. 708.

8. "If several have been deprived of any corporate offices or rights, each must have a separate mandamus, for one writ cannot go to restore many; for the foundation of the writ is the turning out; and the turning out of one is not the turning out of another, and they may be removed for different causes; and so the wrongs being distinct, so should be their remedies."

Case of Andover, 2 Salk. 433.

9. The Court will not grant a mandamus to commissioners of bankrupt, commanding them to sign a bankrupt's certificate; for the legislature has given them a discretionary power to judge of the bankrupt's conformity or not.

Ex parte John King, 7 East, 92.

3. OF THE PROCEEDINGS IN GRANTING A MANDAMUS.

1. "The Court will often grant a mandamus *in the first instance*, on motion, under particular circumstances."

Rex v. Fisher
& al. Justices
of Berks,
Sayer's Rep.
160.

As where the motion was for a mandamus to the defendants *to sign a poor's rate*, which it was proved was regularly made, but the defendants refused to allow it. *Per C. J. Ryder*, If we grant a rule to shew cause, while it is depending, the poor may starve, as no overseer will disburse any money until the allowance of the rate for collecting it; therefore let it be absolute in the first instance.

2. "But the usual mode is by rule to shew cause; as to which it has been settled,"

That in the application to the Court, *the nature of the office* respecting which the application is made, must be shewn to the Court; for as there are certain cases in which the Court will not interfere by mandamus (*ante fol. 665.*) the office to be affected by the mandamus applied for, might be of that description.

2 Mod. 316.

Therefore, where it was to swear in one who was elected one of the eight men of *Ashbourn Court*, it was denied, as it did not appear what the nature of the office was.

3. "Where a person applies for a mandamus, he must shew *some title or colour of title in him*, to induce the Court to interfere."

Rex v. Jotham,
2 T. Rep. 575.

Therefore, where the application was for a mandamus to the trustees of a dissenting meeting-house, to restore one *Lloyd* to the office of minister of the congregation; in his affidavit he only stated his appointment, and *that he conceived that he could not be removed without his consent, unless he should misbehave, but that his appointment was for life*. This was opposed, on the ground that a former minister had been removed, that *Lloyd* had no licence, was not regularly ordained, and had not complied with the regulations of the act of toleration. The Court were of opinion, that he had not made out any, even a *prima facie* title to his office, which was necessary; and refused the mandamus.

Rex v. Vintners'
Company, Mich.
25 Geo. 2.
Bull. N. P. 200.

So where the motion was for a mandamus to the warden of the Vintner's company, to swear *J. S.* one of the court of assistants; the affidavit was only that *he had been informed* by some of the court of assistants *that he had been elected*, but no positive affidavit of an election; the Court nevertheless granted a rule, there being an affidavit that he had applied to inspect the court books to see if he had been elected, and was refused, without which affidavit the Court would not have granted the rule; but said, that had there been a positive affidavit of his election, they would have granted that writ in the first instance.

"But though where a party so applies for a mandamus, whereby he is to be restored to a corporate right, he must shew some title in himself; yet the Court of *K. B.* having the supreme superintendence of all corporations, will grant a mandamus where no particular person is interested."

As

here by charter or prescription the corporate body is to do a definite number, and they neglect to fill up the vacancies when they happen, the Court will grant a mandamus ordering them to do it.

Case of the Town of Nottingham, 23 G. 2. Bull. N. P. 201.

It should be shewn to the Court on the application for a mandamus, *that there had been a default*; for the Court will refuse that any officer or other person has not done his duty unless that is shewn to the Court."

Before, where the mandamus was granted to the churchwardens and overseers of the poor, *to make a rate for the relief of the poor*, the Court would not grant at the same time a mandamus *to the justices to allow it*; for there could be no default in the rate till the poor rate was made, and presented to them to allow it. The Court would not presume that the justices would not do their duty: though in this case the same justices had refused to make a rate when a mandamus had issued for the purpose, and when taken up the term before, on an attachment for disobedience.

Rex v. Borough of St. Ives, Mich. 5 Geo. 3. Bull. N. P. 199.

Where the corporation is by prescription, the party applying for a mandamus must shew the constitution of the corporation, and verify it by affidavit as well as his own right: where the corporation is by charter, a copy of it must be produced at the time of making the motion."

Rex v. Vintners' Company, Mich. 25 Geo. 2. Bull. N. P. 200.

If on the party's shewing cause before the Court, it appears that there was good grounds for his removal from that office to which he applies to be restored, they will not grant a mandamus, even though there appears to have been some irregularity in the proceeding by which he was removed."

Where the application was for a mandamus to restore one to the place of clerk of the *Bridge-House* estates of the City of London, it appeared that he had been reported a defaulter on accounts to a considerable amount, by the city auditors; and at being called to account, and to produce his vouchers, he wrote a letter to the committee, refusing to comply with their requisition; upon which he was suspended, though *he had not been lawfully summoned to make his defence*, which should have been done. Yet the facts above appearing clearly, the Court refused the mandamus.

Rex v. Mayor of London, 2 T. Rep. 177.

Where a mandamus was applied for to restore a person to the office of town-clerk, the corporation laid before the Court a full and sufficient cause for removing him, and that he himself openly declared in court that he would serve them no more. The prosecutors' counsel admitted, that there was sufficient cause for a motion, but objected, that he had been removed *without notice* to appear and defend himself. *Per Lord Eldon*, The Court will not grant a party the assistance of a writive writ, when it is acknowledged that the corporation had sufficient cause to remove him, and when they would undoubtedly remove him the instant he was restored.

Rex v. Mayor, &c. of Axbridge, Cowp. 523.

Where a rule is granted, if on shewing cause it appears sufficient whether the party has a right or not, yet the Court will

Rex v. D. Bland, Bull. N. P. 200. Trin. 1741.

WRITS OF MANDAMUS.

will grant a mandamus, in order that the right may be tried on the return.

Rex v. Wigan,
& Rex v.
Burghley,
2 Burr. 782.

7. Though the Court have granted a mandamus for any purpose, yet may they grant another and concurrent mandamus for the same purpose; but such concurrent mandamus *is not of course*, but is only granted where there is reasonable ground to suspect that the party who first moved for the mandamus does not really mean to execute it, and then a rule is granted to shew cause.

Rex v. Halse,
Sayer
Rep. 106.

And where there are such applications for concurrent mandamuses, the Court will order a time for proceeding to an election to be inserted in the first mandamus.

Rex v. West
Loose,
3 Burr. 1386.

And where there has been a judgment of ouster against a corporate officer, the Court will not grant a mandamus to proceed to the election of another, until the four-day rule given on the *posse* is out, because *till then judgment cannot be actually signed*; and on such application for a mandamus to proceed to a new election, the prosecutor on a former judgment shall have priority.

8. "The rule to shew cause must always be on the same persons to whom the writ is to be directed, in case the rule should be made absolute."

Rex v. Church-
wardens and
Overseers of
Clerkenwell,
8 Geo. 1.
Bull. N. P. 200.

Therefore, where the rule was on the churchwardens and overseers to shew cause why a mandamus should not go directed to them, and *the twenty principal inhabitants*; it was held to be bad; for these last should have been parties to the rule. But the Court gave leave to amend, saying, it would be good on new service.

Rex v. Bankes,
3 Burr. 1453.

And if the mandamus is to proceed to the election of a corporate officer, of which a person is then in possession, *he must be made a party to the rule*.

4. OF THE WRIT.

Under this head is to be considered, 1. The direction of the writ: 2. The body or mandatory part of the writ: 3. The return.

1. TO WHOM THE WRIT IS TO BE DIRECTED.

1. "A mandamus must regularly be directed to those persons by whose authority the party was deprived of that right, to which he applies to be restored, and who therefore have a power of restoring him."

Rex v. Mayor,
&c. of Derby,
Salk. 436.

Therefore, where the mandamus was to the *mayor, aldermen, and capital burgessees of Derby*, commanding them to command A. and B. who had removed the party complaining, to restore him, the writ was quashed; for it was absurd that the writ should be directed to *one person to command another to do any act*: it should have been directed to the parties themselves who were to do it.

2. "The writ should be directed to the corporation *by its corporate name*, where the power of motion resides in the corporation at large."

Therefore where the mandamus was directed to the *mayor, aldermen, and commonalty of Rippon*, and they returned that they were incorporated by the name of the mayor, *burgesses*, and commonalty of *Rippon*; the Court held the writ to be bad, it being directed to the corporation by a wrong name. Rex v. Mayo
&c. of Rippon,
2 Salk. 433.

"And though the thing to be performed is to be done by only *part* of the corporation, yet may the writ be directed to the corporation at large, though it may also be directed to that part of the corporation who are to do the act required by the mandamus."

But it must be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation, which part are not to do the thing required, the writ shall be quashed. Rex v. Mayor
of Abingdon,
2 Salk. 699.

Therefore where a mandamus to admit a person to the office of town-clerk, was directed to the *mayor and aldermen of Hereford*; in fact, the mayor only was to admit; for this fault the writ was quashed; for it would not be known who were to obey the writ, if the direction was insignificant or immaterial. Rex v. Mayor
of Hereford,
2 Salk. 701.

So where the mandamus was directed to the mayor, aldermen, and common-council of *Norwich*, to proceed to the election of a town-clerk, the Court granted a superedeas of the writ, it appearing to the Court on affidavit, that the right of election was in the mayor and aldermen, and the writ was not directed to them, neither was it directed to the corporation by their corporate name. Rex v. Mayor,
&c. of Norwich,
1 Stra. 55.

"But if the writ includes in its direction the whole corporation, or that part which is to make the return, it shall be good, though there may be some informality in the direction."

As where it appeared that the power of motion was in the mayor, aldermen, and others of the common-council, the mayor and aldermen being part of the common-council, and the writ was directed to the mayor, aldermen, and common-council, as if excluding them from being part of it, and it was moved to quash the writ for misdirection: But *per Cur.* Here is no one in this direction who must not join in this act; it is only repeating the several constituent parts of the corporation; and mentioning the entire common-council after the mayor and aldermen, is only a repetition *quoad* the mayor and aldermen; and therefore the motion was refused. Peas v. Mayor
of Leeds,
1 Stra. 640.

3. "Where a writ of mandamus is directed to several acting in different capacities, the writ shall be taken *reddendo singula singulis*; that is, that each person shall do that which belongs to his office."

As where the writ was to the mayor and burgesses of *Tregony*, commanding them, viz. "*quod eligitis & juratis majorem, &c. secundum auctoritatem vestram*," &c. It was moved to superedeas his writ on the ground that the power of electing was in the burgesses, Rex v. Mayor,
&c. of Tregony,
Mod. Caf. 111.

gesse, and that of *swearing in the mayor alone*; so that the mayor could not make a return of this writ as directed to him to elect, nor the burgessees as directed to them to swear: But the Court held, that the writ was to be taken distributively, and that each was to obey the writ according to their several functions.

Rex v. Wigan,
2 Burr. 784.

4. The Court will not specify to whom the mandamus shall be directed, for this might be prejudging the right of the electors; but he who applies must at his peril have it properly directed.

Rex v. Ward,
2 Stra. 893.
3 Ref.

The writ need not set out that the person to whom it is directed is the person whose duty it is to do that for which the mandamus is granted (as to swear and admit, *ex. gr.*); for if it is misdirected it should be so returned.

2. OF THE BODY, OR MANDATORY PART OF THE WRIT.

1. "The writ must be made out according to the rule upon which it was applied for and granted."

Rex v. Wild-
man, 2 Stra. 879.

Therefore where the mandamus was granted, commanding the defendant to deliver *to the company of blacksmiths* all books, papers, &c. which he had in his custody as clerk to the company, from which he had been removed, and the officer took the rule, *to deliver them to a new clerk*; for this variance the writ was superseded, and the party compelled to apply for a new writ.

1 L. Ray. 560.
Bull. N. P. 504.

2. "The writ should contain convenient certainty of the duty required to be done, but need not set forth by what authority that duty exists."

Rex v. Mayor
and Burgessees of
Nottingham,
Sayer's Rep. 36.
Bull. N. P. 204.
S. C.

As where a mandamus had been granted, wherein it was recited that there ought to be in the town of *Nottingham* a common-council, consisting of twenty-four persons, and commanding the defendant to choose six persons to fill up the vacancies; upon motion to quash the writ it was objected that *the nature of the right to have such a common-council, that is, whether by charter or prescription, or how, was not set forth* with sufficient particularity: but the objection was over-ruled, many precedents being to the contrary, and no precise form being necessary in a mandamus.

Moore v. Mayor
of Hastings,
Caf. temp. Hard.
362.

So where the suggestion of the writ was, that the party had a right to be admitted to the office of —, paying a reasonable fine, that is sufficient without shewing how, or by whom it is to be assessed.

Rex v. Dr. Bet-
tesworth,
2 Stra. 857.

So where the mandamus was to the defendant, as judge of the prerogative court of *Canterbury*, to grant probate of the will of Lord *Londonderry*, and exception was taken to the writ, that it only set out that the Earl had *bona notabilia at Westminster* and divers dioceses; but did not say within the province of *Canterbury*, in which case only the defendant could grant the probate: but the Court refused it, saying, that they would not presume an inferior jurisdiction.

3. "It seems that a mandamus can only command the doing of one single act, or be but for one single purpose."

For in this case the Court granted a mandamus to the defendant to make a poor's rate, but *refused to order particular persons to be inserted in it*, though there was an affidavit that such persons were rateable, and that they were omitted to prevent their voting for members of parliament; for the validity of the rate might be tried by appeal.

Rex v. Church-
wardens of
Weobly,
2 Str. 1259.

So the Court granted a mandamus to the mayor to hold a corporate assembly, but refused to add to it, "To admit all persons having a right;" for this involved other questions, and was too complicated, as each person's right was distinct.

Rex v. Mayor
of Kingston-
upon-Hull,
1 Stra. 578.

"But in such case the writ may command several persons acting in their distinct capacities to act officially according to their respective offices."

As where by custom, the court-leet was to present to the steward the person whom the commonalty had chosen to be mayor; the Court granted a mandamus to the steward to hold a leet, and to the burgesses to attend at such court, and to present J. D. who had been chosen by the commonalty.

Rex v. Borough
of Christ-
church, 12 G. 2.
Bull. N. P. 200.
Rex v. Mid-
hurst, 1 Will.
283. S. P.
Called Rex v.
Ld. Montague,
Bull. N. P. 200.

"5. In a writ of mandamus such facts should be alledged as are necessary to shew that the party applying for it is entitled to the relief prayed."

For where in a mandamus to the Bishop of *Oxford*, commanding him to licence the Rev. *Isaac Kempe* to the curacy of *Ambriden* in *Oxon*; the writ stated that he had been duly nominated and appointed by the inhabitants of the township, without stating either the consent of the rector or any endowment or custom for the inhabitants to make such a nomination, either of which was necessary to give a right: the Court quashed the writ.

Rex v. Bishop
of Oxford,
7 East, 345.

6. If the corporation to which the mandamus is sent is above forty miles from *London*, there shall be fifteen days between the teste and return of the first writ: but if but forty miles or under, then but eight days, and the writ should not be tested before it was granted by the Court.

Anon.
Salk 434.

And in such case one day is to be taken exclusive, and the other inclusive.

Rex v. Mayor
of Dover,
1 Stra. 107.

3. OF THE RETURN.

Writs of mandamus being either to restore or admit, I shall consider distinctly the return to each.

Returns are to be considered, 1. In point of substance; 2. In point of form.

1. Of the Return in point of Substance.

In order to make a return good in this respect, it must appear, 1. That the removal was by persons who had legal power to remove: 2. That the person was removed for good and legal cause: 3. That the proceedings under which the removal took place were regular.

Of each of these in order.

1. The Motion must have been made by Persons having lawful Authority to do so.

Bagg's case,
11 Co. 99.
Lord Bruce's
case, 2 Stra. 819.
Rex v. Richardson,
1 Burr. 539.

It seems to have been long a question in whom the power of motion resided. Lord *Coke* in this case lays it down, that the power can only belong to the corporation by charter or prescription. But this doctrine has since been exploded; and it has been solemnly adjudged that there is *incident to every corporation, a power of motion*.

Rex v. Mayer
of Lyme Regis,
Doug. 144.

The law therefore now is, that corporations may claim a power of motion either by charter or prescription; charters may give it to the whole, or to a select body, but if it gives it to neither, the law gives a power of motion to the whole body at large.

Rex v. Corp. of
Doncaster,
1 Tr. 25 Geo. 2.
Sayer, 37.

But a power of motion can never be exercised by a part of the corporation, as the common-council, *ex. gr. unless expressly given by charter or prescription*.

2. The Person must be removed for good and legal Cause.

Good causes of motion may be in general for malfeasance, or for nonfeasance; that is, for crimes, which render him unfit for the duties of his station; or neglect, such as prevents him from the due discharge of them.

Bagg's case,
11 Co. 99, & per
Lord Mansfield,
1 Burr. 339.

1. Malfeasances or crimes are of three descriptions: First, Such as are infamous in their own nature, but have no relation to his office; as attainder for forgery, perjury, or conspiracy at the king's suit, or for any crime rendering them infamous: but to ground a removal for any of these causes, there must be a previous conviction by indictment in the king's courts; 2. Such crimes as are offences against his oath of office, and duty as a corporation, such as burning or erasing the records of the corporation; for this crime he may be tried and convicted by the corporation, and for that removed: 3. Crimes of a mixed nature, such as are both indictable and against his duty as a corporator; as bribery.

Mod. Caf. 19.
100.

Under this general description of offences it is to be observed,

1. "That the offence sufficient to justify the removal of a corporator, or corporate officer, must appear to have been done *malò animo*."

Rex v. Willis,
4 Burr. 1999.

For where the recorder of a borough gave wrong advice with regard to corporate proceedings, as it appeared to have been innocently done, it was adjudged to be an insufficient cause for removal.

2. "As to such crimes whereof a previous conviction is necessary to found the disfranchisement on, it is the infamy of the crime that renders him an improper person to be continued in the office of trust; therefore, if the crime for which he is convicted be such as carries no infamy with it, it will be no cause for disfranchisement."

It was therefore held,

That a *corporator having become a bankrupt*, was in this case adjudged to be an insufficient cause of removal; for bankruptcy is neither a crime in the eye of the law, nor an offence in any light contrary to the duty of a corporator; for which causes only the removal would be lawful.

Rex v. Mayor,
&c. of Liverpool,
2 Burr. 723.

So a conviction *for an assault* is an insufficient cause; for such is not an offence of an infamous nature.

Rex v. Mayor
of Derby,
2 Geo. 2. Bull.
N. P. 206.
Carth. 173.

3. "The offence, if not on account of the infamy, must have some respect to the corporation itself; that is, such as is *detri- mental to the corporation itself, or some of its liberties, privileges, or franchises.*"

Therefore a personal offence from one member to another is not a sufficient ground of disfranchisement: so though rasu- re of the corporation-books may be a good ground; yet, unless it be in a matter to the detriment of the corporation, it is other- wise; so misemploying the corporation-money is not a suffi- cient cause of removal, because the corporation may have their action.

Bull. N. P. 208.
Ibid.
2 Raym. 1283.

"So a mere contempt of, or contemptuous words used to the corporation, or any member of it, is not a sufficient ground of amotion."

As where in a mandamus to restore Dr. Bentley, the return of the cause of his amotion was, that being cited to answer a plea of debt in the Vice-Chancellor's court, he said the process was illegal and unstatutable, and that he would not obey it; that he took the process from the officer, and said the Vice-Chancellor was not his judge, and that he *stulte egit*, for which contempts that he was at a future congregation deprived: the Court were of opinion that these causes were insufficient; though a peremptory mandamus to restore him was granted on another ground, viz. that he had not been summoned.

Rex v. Chan-
cellor, &c. of
Cambridge,
2 Stra. 557.

4. "A misbehaviour *in one office* is no ground to amove a person from another."

As where the person had misbehaved in the office of *chamber- lain*, and he was removed from being a burges, it was held not sufficient.

2 Raym. 1564.

5. "Where an office is held at pleasure, in such case the person in possession may be removed without any cause as- signed."

1 Lev. 291.
1 Vent. 77. 88.

As where the mandamus was to the churchwardens of *Thame*, to restore J. Williams to the office of sexton; they returned, that *Thame* was an ancient parish, and that for time immemorial there has been a church; that the sexton was eligible by the churchwardens and major part of the inhabitants; which per- son so elected was to continue at the pleasure of the electors, and was amovable by the major part when lawfully assembled; that 1 May 1703, J. Williams was elected sexton, and continued in the office till 31st of June 1717; on which day the church- wardens and parishioners being lawfully assembled, he was re- moved; the return was adjudged to be good, though no other

Rex v. Church-
wardens of
Thame,
1 Stra. 115.
Rex v. Mayor
of Canterbury,
1 Stra. 674.

cause was assigned for his removal than the pleasure of the electors.

“ But where an officer is so removable at will, and is removed by the corporation, if they in *their return* to a mandamus to restore him do not rely on their power, but *return a cause of removal, if that is insufficient*, the Court will grant a mandamus to restore the person removed.”

Rex v. Mayor
of Oxford,
2 Salk. 428.

As where the mandamus was to restore one *Slatford* to the office of town-clerk, and the return stated him to be an officer at the will of the mayor and aldermen; but that he was removed, his office being void for *not having taken the oaths of allegiance, &c. before them*; this being insufficient, as he might have taken them before two justices, a mandamus went to restore him, though it had been sufficient if they had stated that he had been removed, as holding his office at pleasure.

2. Nonfeasance, or neglect of the corporator's duty, is the next legal ground of amotion.

As to this it has been decided,

Rex v. Mayor
of Leicester,
4 Burr. 2087.

1. “ That to make this a good cause of amoval, it must amount to an *absolute desertion and neglect of all the duties of a corporator*; for an occasional absence for a short time, as for health or urgent business, that shall not be sufficient.”

Rex v. Wells,
4 Burr. 1999.
Serj. Whitaker's
case, Salk. 434.

As where the recorder of a borough was absent from *one session*, where his presence was necessary, and where he had no notice to attend; without shewing any farther intention of leaving the borough: it was held an insufficient cause to remove him; though non-attendance is otherwise a good ground to remove a recorder, his office being a public one relating to justice.

Rex v. Richardson,
1 Burr. 317.
Rex v. Mayor
and Aldermen
of Carlisle,
1 Stra. 385, 386.
S. P.

So absence from four occasional great courts, and one on a stated day, was adjudged to be not a sufficient ground for amotion; for a corporator may be innocently absent where he may not think his presence absolutely necessary; and therefore unless he neglects where he has a particular summons and notice, it cannot be construed a desertion of his office.

Rex v. Ponsonby,
M. 25 Geo. 2.
Bull. N. B. 206.
4 Mod. 56.
Vid. Vaughan
v. Lewes,
Carth. 227.

2. Non-residence is another species of nonfeasance: but it is only in the case of offices which require a perpetual execution; as mayor, sheriff, coroner, where perpetual residence is necessary; as in the case of recorder, freemen, &c. for it would be absurd to say that non-residence merely should be a cause of amoval, where, notwithstanding such non-residence, they may do all their duties requires; though if such persons totally neglect their office and duty, they may be removed.

Rex v. Mayor
of Doncaster,
Sayer Rep. 37.

Therefore where the corporator resided three miles from the borough, it was held, that that was not such a desertion of his office as to justify a removal; for he was near enough to attend his corporate duty.

Rex v. Miles,
P. 9 G. 1.
Bull. N. P. 207.

So that in such case it is not sufficient to shew a non-residence for unless there be ~~an express clause in the charter~~ non-residence will not be sufficient to shew a non-residence but it would be good if it amounts to a total desertion.

Therefore where a corporator resided 200 miles from the borough, and had been absent for 22 years, this was considered as a total desertion of the duties of his offices, and holden to be a good cause of amoval.

Rex v. Mayor
of Newcastle,
Cited Sayer 39.

And where a corporator is removed on the ground of non-residence, it is not necessary for the corporation to give him notice to come and reside before they remove him; for he is bound by his office to reside; and if such is the law, he ought to know it.

Rex v. Mayor,
&c. Lyme Regis,
Doug. 144.
3 Ref.

3. The Proceedings under which the Removal has taken place, must be regular.

1. "Where a corporator is to be removed, every individual member of the corporation, or part of the corporation, in whom the power of amotion resides, ought to be summoned."

Rex v. Mayor,
&c. of Liver-
pool,
2 Burr. 723.

Therefore where all the members of the corporation had been summoned, *except one*, whom the bailiff had supposed to have been absent and out of summons, though he had a house and resided within the town, the Court resolved, that for this irregularity the amoval was clearly bad, as a summons should have gone to every member.

Kynaston v.
Mayor, &c. of
Shrewsbury,
2 Stra. 1051.

"When it is said, that every member must be summoned, it means every member within summons; that is, resident within the limits of the borough."

Bull N. P. 208.
5 Burr. 2601.

For if it appears that he lived out of the limits of the borough, it is not necessary to return that he was summoned.

Rex v. Mayor,
&c. of Newcastle,
2 G. 2. Ld. Ray.
226.
2 Burr. 742.

Quere, If such summons is necessary where the meeting is on a charter-day?

2. "This notice should contain the particular business; that is, that the amotion of a corporator was the business for which they were summoned."

Rex v. Mayor
of Doucaster,
1 Burr. 738.

"For though convened on other business, they cannot proceed to disfranchise a corporator, unless they have met in pursuance of a notice for the purpose of removing him, even though he himself is present."

For where on a return to a mandamus, it appeared that the power of amoving was in the mayor and aldermen as a select common council: that the whole corporation having been summoned to elect a recorder, after the election was over, the mayor and aldermen separated from the rest, and removed the prosecutor. This was adjudged to be void, for want of summons to the common council only, to meet for the purpose in their distinct capacity.

Rex v. Corp.
of Carlisle,
Trin. 6 G. 1.
1 Stra. 384.
L. Raym. 1357.
S. P.

3. "So particular notice must be given to the party himself who is to be disfranchised, that the assembly mean to proceed to remove him, in order that he may prepare his defence."

2 Burr. 731.

As where a mandamus was granted to restore Dr. Bentley, the defendant returned, that he had been summoned to answer in a plea

Rex v. Chancel-
lor, Master, and
Scholars of the

University of
Cambridge,
1 Stra. 557.

a plea of debt before the Vice-Chancellor's court, and that had refused obedience, and acted contumaciously, for which congregation removed him; but it appeared, that Dr. Ben had never been summoned to answer before the congregation; for omission the Court granted a peremptory mandamus to rest him.

Rex v. Mayor
and Burgeffes of
Axbidge,
Cowp. 532.

But where a corporate officer had declared that he would serve no longer, and had in other respects misdemeaned himself though he was removed without notice, the Court refused the writ to restore him, the causes of removal appearing sufficient.

Rex v. Mayor,
&c. of Rippon,
2 Salk. 433.

So in the case of a mandamus to restore Sir J. Jennings to office of alderman, the corporation returned, that at an assembly the corporation, he came and *personaliter libere & debito modo renavit* his office, declaring he would serve no longer; whereof they chose another in his room: this was held to be good, though the Court further held, that till such election he had power waive his resignation.

Rex v. Mayor
and Burgeffes of
Wilton,
Salk. 428.

So where the mandamus was to restore Elias Chalk to place of burgeffes of Wilton, the defendants returned a custom remove for misbehaviour, and then set out several instances misbehaviour; and that *he being therefore fully heard to all that was objected in the common-council*, he was turned out; it was objected, that it was not said that he was summoned; *sed per C.* The end of the summons is, that he may be heard for himself and therefore where he has been heard, want of summons is objection.

Note. Where the mandamus is to admit, the question turns the validity of the election; which will be fully considered in the chapter of *Quo Warranto*.

2. Of the Return considered in point of Form.

1st. Who shall make the return: 2d. In what manner: 3d. The proceedings on the return.

1. Who shall make the Return.

Rex v. Mayor,
&c. of Abingdon,
Salk. 431.
Rex v. Mayor,
&c. of Norwich,
Salk. 432. S. P.

A mandamus was directed to the mayor, bailiffs, and burgeffes of the town of Abingdon; the mayor made a return, and brought it into the crown-office, intending to move to have it filed; a motion was made to stay the filing of it on a suggestion, that this return was made by the mayor and the minor part of the corporation against the consent of the majority, who would have obeyed the writ: but *per Holt*, Where a writ is directed to a single officer, as a sheriff, and a stranger makes a return with his privity, he may at any time that term wherein the writ returned, come in and disavow it; but not after the term (*Dyer*, 182.) But in this case where the writ is directed to several, and the mayor, who is the most principal and proper person, returns and brings in the writ, the Court will not upon affidavit

affidavits examine whether there was the consent of the majority: the return must be received, and a remedy lies against the mayor; and if the return is falsified, a peremptory mandamus must go.

In what Manner the Return is to be made.

1. "The return to a mandamus should set out all necessary facts precisely, to shew the person removed in a legal and proper manner, and for a legal cause: it is not sufficient to set out *conclusions* only; the *facts* must be precisely set out, that the Court may judge of the matter. So it is the same as to the *cause* of the amotion, that must likewise be set out."

Per Ld. Mansfield, 2 Burr. 731.

Therefore where to a mandamus to restore one *Joseph Clegg* to the place of common-councilman of *Liverpool*; the defendants returned generally the cause of the amotion, by the common-council, who were *in due manner met and assembled*: the Court held the return to be bad; for that they were so duly assembled was a conclusion of law; they should have set out the facts, viz. That they had, as a select body, the power of amotion: that the members were summoned by regular and proper notice: and that *Clegg* himself was also regularly summoned and heard in his defence.

Rex v. Mayor, Bailiffs, and Burgeesses of Liverpool, 2 Burr. 723.

So if the amotion has been by a part of the corporation, the return should shew how they have such authority, whether by charter or prescription; for as the power of amotion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it; that is, whether by charter or prescription.

Rex v. Mayor and Aldermen of Doncaster, Sayer Rep. 37. 1 Ref. Dougl. 144. S. P.

2. "Therefore a return in too general terms is bad: as to say that the party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without saying what these rules and orders were."

2 Ld. Raym. 1564.

So a general return of removal for neglect of duty has been held to be bad, without stating the particular instances of neglect and omission, that the Court may judge of its sufficiency.

Rex v. Mayor and Aldermen of Doncaster, Sayer Rep. 37. 3 Ref.

So where the mandamus was to restore *A.* to the place of schoolmaster of the grammar-school of *Morpeth*, and the defendants returned, that at the time of publishing the act primo of his majesty's sign, *A.* was under-schoolmaster, that he never took the oaths by the act appointed, *ratione cujus* he became incapable, and that therefore they could not restore him: This return was held to be bad, as being in too general terms; it should have said that he did not take the oaths of supremacy, allegiance, and abjuration, and such as are required by a schoolmaster; for he is not obliged to take the Scotch oath; so there is an exception of officers in the fleet, &c. It therefore should appear that he was not excepted: for the party having no opportunity to plead in this case, the return ought to be certain to every intent.

Rex v. Balivos de Morpeth, 1 Stra. 52.

3. The return must answer to the material part of the writ, not the words only; for if it be false in substance, though true in words, an action will lie,

Show. 365.

Britishwits's case, 1 Vent. 29.

4. "The

4. "The return to a mandamus may contain *any number of causes current and consistent causes*, to shew why the party should not be admitted or restored."

Wright v. Fawcett,
4 Burr. 2041.

As where the mandamus was to admit the plaintiff to the place of freeman of *Morpeth*; the return was, 1st, That he *was not duly elected*: 2d, That by the custom of the borough, no person could be admitted as a freeman, unless he was approved of by the lord of the manor or borough, and that the plaintiff *was not so approved*; objection was taken to this return *that it was double*: but it was nevertheless held good, and that the officer might return any number of good and consistent causes.

"But the causes must be consistent."

Rex v. Churchwardens of Taunton, St. James,
Cowp. 413.

Therefore where the mandamus was to restore a person to the office of sexton; the return was, 1st, That he was not duly elected: 2d, That there was a custom in the inhabitants to remove at pleasure, and that they had so removed him pursuant to the custom: It was objected to this, that the causes were inconsistent; that he was not duly elected, and yet that he was regularly turned out: But the Court held the causes to be consistent: for as he was in possession *de facto*, they might justify the removal either on the ground that he was not duly elected, or, if he was so, that they had a right to remove him at their pleasure.

Regina v. Mayor and Aldermen of Norwich,
2 Salk. 436.

But where the mandamus was to admit one *Dunch* to the place of alderman of *Norwich*; the defendants returned, that when a person is elected alderman by the ward, the court of aldermen may refuse him: that *Dunch* was so chosen alderman by the ward, but they refused to admit him, because he had not received the sacrament within the year; that he was turbulent and factious, and procured his election by bribery; and *quod non fuit electus*. The Court agreed that several causes might be returned, but that they must be consistent, which here they were not; for when *Dunch* was chosen by the ward it was an election, before approbation by the aldermen; the return first admits this election and avoids it, and yet at last they return that there was no election, which is repugnant.

Rex v. Mayor, &c. of Cambridge,
2 T. Rep. 456.

But if a return to a mandamus consists of several independent matters not inconsistent with each other, but some good in law and some bad, the Court may quash the return as to such as are bad, and put the prosecutor to plead to or traverse the rest.

Rex v. Mayor, &c. of Oxford,
Salk. 428.

5. If the mandamus is to restore the person applying to an office *held at pleasure*, and the defendants who have that power of removal *do not return* it, but return that the removal is for a misdemeanor or such cause, and the Court find that cause so returned insufficient in law, they will not refer the removal to the power the defendants may have to remove *ad libitum*; but take it that the removal was for the cause returned, and grant a peremptory mandamus.

Rex v. Mayor, &c. of Coventry,
Salk. 430.

And where the corporation have such power to remove at their pleasure, they must return it *positively*, and not by way of recital.

6. "If

6. "If the supposal of the writ is wrong, as in mis-stating the constitution of the corporation, the return must deny this supposal of the writ, and it will not be sufficient to state it truly in the return."

Therefore where a mandamus issued to the defendants, reciting, That whereas *they ought to chuse yearly two bailiffs out of such as had not been bailiffs for three years before, ideo* they were commanded to choofe; they returned their constitution by letters patent to be *to choofe two from among the aldermen*, and that they had chosen two according to the form and effect of the letters patent generally; this was held bad; *for they ought to deny their constitution to be as mentioned in the writ*, or shew a compliance with the writ; whereas they have acted according to a constitution set forth in the return different from the writ, and yet have not denied the supposal of the writ; so a peremptory mandamus was granted.

Rex v. Bailiffs and Burgessees of Malden, Salk. 431.

So if the writ is directed to the corporation by a wrong name, they should return the matter specially and rely on it; but if they make a return, they admit themselves to be the corporation to whom the writ was directed, and cannot afterwards avail themselves of the misnomer.

Rex v. Bailiffs, &c. of Ipswich, 2 Salk. 434.

7. Clerical mistakes in the returns to writs of mandamus may be amended after the filing of the return.

Rex v. Lyme Regis, Dougl. 130.

8. Where the mandamus is by writ out of chancery, no attachment lies for not returning it till the pluries issues; but where the mandamus is out of the King's Bench, the first writ ought to be returned; but an attachment is never granted without a peremptory rule to return the writ.

Mayor of Coventry's case, Salk. 428.

And if the corporation to which the mandamus is sent be above forty miles from London, there must be fifteen days between the teste and return; but if it is forty miles or under, eight days only.

Anon. 2 Salk. 434.

9. The return need not be under the seal of the corporation, or signed by the mayor; but if an action is brought against the mayor for a false return, proof of the delivery of the writ to him and of the return made, will be sufficient.

2 Ld. Raym. 148.
1 Ld. Raym. 223.

3. Of the Proceedings on the Return.

These proceedings are either at common law, or under the statute 9 of Ann.

1. Of the proceedings at common law.

1. This was by action on the case for a false return; and where the return is made by several, the action may be either joint or several, for it is founded on a tort; but it must not be against any of those who voted against the return, but who were over-ruled by the majority; for the action lies against the individuals, though the return is made in the name of the corporation.

Bagg's case, 11 Co. Carth. 271.
1 Ld. Raym. 64.

And where the mandamus was directed to the two bailiffs, one as for obeying the writ, the other would not, nor join in the

Rex v. Bailiffs of Bridgworth, 2 Stra. 808.
1 Ld. Raym. 125.

return; the Court granted an attachment against both, saying would be endless to try in all cases which was right; and it was always be used as an handle to delay.

But if they made no return, an attachment would issue.

2 Str. 805.

2. Where several have joined in an application for a mandamus they should all join in an action for a false return.

Carth. 228.
Sir Peter Rich
v. Pilkinton,
Lord Mayor of
London,
6 Mod. 152.
S. 2.

And where in case for a false return, the plaintiff set out election as on the 1st of *October*; proof that he was chosen 29th of *September* was held to support the declaration, for the return was but form.

Buckley v. Palmer, 2 Salk. 430.

3. Where an action was brought for a false return, and plaintiff had a verdict, so that the return was falsified, the Court always granted a peremptory mandamus; but the plaintiff could not move for a peremptory mandamus till the four days after return of the *postea*, because the defendant had till then to move in arrest of judgment.

Anon.
Salk. 428.

But where the action had been brought in the Common Pleas and the plaintiff had a verdict, and then moved in *K. B.* for a peremptory mandamus, the Court refused it; for *per se* the mandamus recites *prout patet recordum*, which cannot be here, as we cannot take notice of the records of the Common Pleas.

5. OF THE PROCEEDINGS UNDER THE STATUTE 9 ANN.

By this stat. 9 *Ann. c. 20.* it is enacted, "That where any person has been deprived of his freedom, or of any corporate or common right, or to which he was entitled, or refused admission thereto, where a mandamus had so issued, and a return made thereto, it shall be lawful for the persons so suing the mandamus to *plead and traverse all or any of the material facts contained in the return* which the persons making the return may plead, take issue on, demur, and the proceedings be had as in an action on the case, and the issue be tried in the same manner; and if a verdict shall be found for the persons suing out the mandamus, or if they have judgment on demurrer, or *nil dicit*, or in any manner that in such case the party so succeeding shall have damages, costs, and a peremptory mandamus: but if the persons making the return have judgment, they shall in like manner have damages and costs."

Under this statute it has been held,

Rex v. Church-
wardens and
Overseers of
Salop,
Hil. 8 Geo. 2.
Bull. N. P. 201.

1. That as the first writ of mandamus always concludes with commanding obedience or cause to be shewn to the contrary; if a return is made to it, which on the face of it appears to be insufficient, the Court will grant a peremptory mandamus; and if it be not obeyed, a peremptory mandamus shall issue against the persons disobeying it.

Bull. N. P. 201.

And where the mandamus is directed to the corporation to do a corporate act, and no return is made, the attachment is granted.

granted against particular *persons* who refuse obedience to it ; but where it is directed to several persons in their natural capacities, there an attachment shall go against all : but when they are before the Court, their punishment will be proportioned to the offence of each.

And where no particular person is interested in the false return, the Court may nevertheless grant *an information* against the persons who made it ; but the return must be filed and allowed before the information can be moved for.

Rex v. Mayor,
&c. of Nottingham.
Hil. 25 Geo. 2.
Bull. N. P. 203.

2. Where the return to a mandamus is traversed and tried, but at the trial the jury omit to find damages, whereby there can be no judgment for costs, this cannot be supplied by a writ of inquiry ; but the plaintiff may have an action for a false return.

Kynaston v.
Mayor, &c. of
Shrewsbury,
2 Stra. 1052.

CHAPTER II.

Of Informations in the Nature of *Quo Warranto*.

INFORMATIONS in the nature of *Quo Warranto* are granted by the Court of King's Bench, for the purpose of trying the rights of persons to any corporate or other franchise into which they have intruded, for the purpose of removing them.

In treating of this proceeding, I shall first consider what intrusion into corporate or other franchises shall be deemed a proper subject for an information in the nature of *quo warranto*: 2dly, The proceedings to obtain it, and the rules laid down by the Court in granting it.

I. WHAT INTRUSIONS INTO CORPORATE OFFICES ARE OBJECTS OF INFORMATIONS QUO WARRANTO.

1. Intrusions into corporations are, 1st, Where the person was ineligible: 2dly, Where the election of the person has been irregular, informal, or contrary to law: 3dly, When made under a bye-law: 4thly, Where the election has been held before a person without authority: 5thly, Where the office becomes void by any subsequent matter.

1st. Of Elections void for Ineligibility of the Person.

Rex v. Carter,
Cowp. 220.

1. As where the defendant had been elected a burghess of *Portsmouth* at five years old, though he was not sworn into the office till he was the age of twenty-one, yet was he deprived by information *quo warranto*, the Court being clearly of opinion, that an infant was ineligible to such a corporate franchise.

2. By stat. 13 *Car.* 2. it is enacted, "That no person shall be chosen to any corporate office who has not taken the sacrament within a twelvemonth preceding the election; and in default of so doing, the election shall be void."

Per Ld. Ch. J.
Willmot, Harrison v. Evans,
4th Cowp. 535.
Rex v. Monday,
Cowp. 535. and
recognized per
Ld. Mansfield,
8 C. Cowp. 517.

This statute is not only addressed to the elected, and a prohibition upon them, but is a prohibition to the electors, if they have notice: The legislature has commanded them not to choose a non-conformist, because he ought not to be trusted. Both by the statute therefore and authorities, the election is void: And the statute 5 *Geo.* 1. c. 6. § 3. applies only to persons in actual possession, and was to quiet such possession, if no legal remedy was pursued within a certain time.

So

So where by the charter of the borough of *Carmarthen*, no person could be elected a burges except he had for three years before been seised and possessed of an estate of freehold for *term of his life*, or some greater estate in land of a certain value, with an exception of such as should be seised of *such* estate of such yearly value, which had come to him by descent or marriage : It was adjudged, that where a party by marriage became entitled to an estate of sufficient value *for the life of his wife*, was not within the exception, and therefore not qualified.

Rex v. Gabriel.
Powell,
8 T. Rep. 439.

3. " Votes given for a candidate who is ineligible, are to be considered the same as if the persons had not voted at all, this is supported by a variety of cases. *The Queen v. Boscarven*, and " other cases cited in *Cowp.* 537."

Per J. d. Ellen-
borough,
10 East, 217.

Where therefore the defendant had been chosen to the office of one of the aldermen of *Helfton*, he not having taken the sacrament within the year, and notice at the time of the election was given to that effect, the opposite candidate, who had the smaller number of votes, was held to be duly elected ; and though the defendant received the sacrament within the year, and so under stat. 47 Geo. 3. *ft.* 2. c. 35. was indemnified and re-capacitated as to all rights, yet that statute having a proviso in it, that such taking of the sacrament shall not extend to restore or entitle the person so taking it to any office legally filled up and enjoyed by any other person, it was held, that the election of the person so chosen was valid, and the office legally filled up by *him*, so that the defendant was not entitled to it.

Rex v. Hawkins,
10 East, 211.

2. Of Elections void for Irregularity.

1. " Where the mode of election is directed by the charter, that " must be followed, or the election shall be void."

It will therefore be necessary to consider the several constructions on different charters which have come before the Court.

1. In this case by the charter, the election of the mayor was ordered to be made by the mayor and the burgeses, or the majority of them : it was adjudged on this, That in order to a good election there must be a majority in number of the corporation *actually assembled*, by whom the election must be made ; and therefore where the corporation consisted of the mayor and eleven burgeses, and *four only* met and elected the mayor, it was held that this election was void, such not being a majority of the subsisting burgeses.

Rex v. Grimes,
5 Burr. 2598.
Rex v. Bell-
ringer,
4 T. Rep. 810.
S. P.

And so if the major part of the corporation was dead, it has been held, that the corporation would have been dissolved, or at least that those who survived could not have proceeded to a new election. But where the words give the election to a majority of the members for the time being, it will be different.

Rex v. Rees, &
Rex v. New-
ham,
Pach. 1775.
cited per Aston
Just. Cowp. 537.

So where the mayor or other presiding officer, who by the constitution of the borough forms an integral part of the elective

Rex v. Buller,
8 East, 389.

assembly, is present at the commencement of an election, but parts before its conclusion, the election made after his departure is void.

Rex v. Smart,
4 Burr. 2241.

2. "Where the charter of the borough of *Malden* orders the election of an alderman to be by the bailiffs and head burgesses, or the major part of them," there were two bailiffs both were present when the defendant was elected, but one of them was afterwards ousted on an information *quo warranto*. It was resolved, That by the words of the charter, the bailiffs were an integral part of the corporation, without whom no vote could be done, and that the presence of both was necessary; that by the judgment of ouster against one of them, the directions of the statute were not complied with, for the election was then before one only; and so there was judgment for the king.

Sir Robert Salisbury Cotton v. Davies,
1 Stra. 53.

3. The borough of *Denbigh* consists of two bailiffs, two aldermen, and twenty-five capital burgesses, and the election of the capital burgesses is ordered to be by the bailiffs, aldermen, and capital burgesses for the time being, or a majority of them of which one bailiff and one alderman must be two; it was adjudged, That the statute only required the presence of one bailiff and one alderman, but gave them no negative voices, so that a person might be elected, though they both voted against him.

Foot v. Prowse,
Mayor of *Truro*,
1 Stra. 625.

4. In the borough of *Truro* the mayor is to be chosen out of the aldermen *annuatim eligend.*; the fact at the trial was, that the aldermen present at the defendant's election had been in several years, and none of them had been re-elected within a year; it was held that *annuatim eligend.* was only directory, and that an annual election of them was not necessary to make an election in their presence good: and Ch. Just. King, who delivered the opinion of the Court, compared it to the case of constables and other annual officers, who are good officers after the year is out until others are elected and sworn.

6. How far the granting of a new charter shall affect the corporate proceedings, is proper here to be taken notice of.

Rex v. Palsmore,
3 T. Rep. 199.

When an integral part of a corporation is gone, and the corporation has no power to restore it, or to do any corporate act until the corporation is dissolved, and the crown may grant a new charter; as in this case of the borough of *Helfton*, of which corporation only one alderman and seven burgesses remained; and no mayor could be elected, or any alderman chosen, nor could the burgesses either by usage, prescription, or charter hold any corporate assembly; the Court were of opinion, That the corporation was dissolved, and the new letters patent, granting them a new charter, was valid.

Comb. 316.

If a corporation refuse a new charter, it is void; but if they accept and put it in execution, it is good; and whether a corporation have accepted a new charter or not, is a matter of evidence, not of law; and proof of acting under it is proof of acceptance.

By accepting a new charter, granting new rights, or giving a new name of incorporation, without a surrender of their old charter, the corporation will not lose any of their former franchises.

Vent. 355.
4 Co. 87.

Which surrender must be enrolled.

Rex v. Osborne,
4 East, 347.

By the charter of *Hen. 4. Norwich* was made a county, and to have two sheriffs to be chosen by the commonalty. *Char. 2.* By charter confirmed their former charter, but granted further, that one sheriff should be chosen by the mayor, sheriffs, and aldermen only. *Per Holt Ch. Just.* The king cannot resume an interest he has already granted, unless the grantees concur: the corporation might have used this as a new grant or confirmation; and having made the election in question according to it, it is evidence of their intention to accept it as a grant.

Rex v. Larwood,
Salk. 167.

But where the constitution of a corporation is settled by act of parliament, it cannot be varied by the acceptance of any charter inconsistent with it.

Rex v. Miller,
6 T. Rep. 268.

In a *quo warranto* against the defendant, as mayor of *Bodmyn*, he claimed under a charter 5 *Eliz.* whereby a power was given to him to hold over the office of mayor till another was chosen; but it appearing that by a subsequent charter, 36 *Eliz.* the mode of election was altered, and all former modes of election abolished, though the words were, abolishing the modes *eligendi, nominandi, & appointuandi* the mayor; this was held to abolish the right of holding over, though it said nothing of abolishing the mode *tenendi* the office.

Rex v. Phillips,
1 Stra. 394.

The proclamation made by *James 2.* in the fourth year of his reign, for restoring such corporations to their ancient charters as had surrendered them to *Charles 2.* (but which surrenders were not enrolled); shall operate as a grant of revival of such charters (if accepted), and restore them.

Newling v. Francis,
3 T. Rep. 289.

I shall now proceed to other informalities, by which elections may be avoided.

2. "Where the election has been by the body corporate, but not corporately assembled by previous summons, such election is void, unless the whole elective body be present and consented."

As where the whole common-council, (who were the electors,) except one, met at a public-house to drink, when they were acquainted that *W.* had resigned, upon which it was proposed to choose the plaintiff, which was objected to by two or three; however, he was sworn in: This was holden not to be a good election, on the grounds above.

Sir Charles
Muggrave v.
Nevinson,
2 Ld. Raym.
1358. 1 Stra
S. C. 584

So where upon evidence it appeared that the corporation met on a particular day (pursuant to a bye-law) for the election of a mayor, it was holden that they could not proceed to the election of an alderman for want of summons, there being no custom to warrant it.

2 Ld. Raym.
1355.

So all the members individually should be summoned to attend an election; but if any of them are not within summons, as

Rex v. Grimes,
5 Burr. 2598.

not resident within the borough, such person need not be summoned.

Rex v. J. Theodorick,
8 East, 543.

But where no summons is required by the charter, and the whole body of the corporation have been summoned for a particular purpose, (*ex gr.* the resignation of a corporator;) if *all the persons* in whom the right of election to the vacant place are present, they may immediately proceed to elect another, though no summons has issued.

Per Lord Mansfield,
5 Burr. 2682.

3. "So where there is any *usual mode of giving notice* of an election, that mode cannot be dispensed with, nor can the election be good without complying with it, unless all the persons who have a right are actually summoned and unanimously agree."

Rex v. May,
Rex v. Little,
Freemen of
Salisbury,
5 Burr. 5681.

As where the *usual place* of corporate elections was the *Guildhall*, and the *usual notice* was by ringing a bell at eight, nine, and ten o'clock on the morning of the election; the election of the defendants was not at the *Guildhall*, but at an inn; was upon a bye-day, and there was *no notice by ringing of the bell*; but all the electors entitled to notice had personal notice of this meeting at the inn, and of the business to be there transacted; the Court concurred in the doctrine above delivered by Lord Mansfield.

Rex v. Monday,
Cowp. 530.

4. "Where a number are to be elected, they should be put up singly, and the sense of the electors taken upon each."

For where the mayor and four aldermen met to elect seven burgesses, the mayor and one alderman gave in a list of seven, and the three aldermen a list of seven also; but of these last some were ineligible; and the election was declared to fall on the seven given in by the mayor, one of whom was the defendant: this election was adjudged to be void, first, Because the several persons had not been put up singly; 2dly, It being contended, that as part of the aldermen's list had been incapacitated, the three votes given to them must be deemed as absolutely thrown away; and that as it was not in the power even of the majority present to prevent the election, that part of the mayor's list must be held to be elected, and that the election must be deemed to fall on the defendant: but it was resolved, that the mayor's list being entire, it was impossible to say that any individual of them was elected; and so the election was void as to all.

"It is said in the last case, that when a corporate assembly is convened, it is not in the power of any part of the members to stop the election; on which point the following decision took place:"

Oldknow v.
Wainwright.
Rex v. Foxcroft,
2 Burr. 1017.

As where the question was, whether the defendant or one Seagrave was duly elected to the place of town-clerk of Nottingham: the case was, that all the electors, in number twenty-five, were regularly summoned, and twenty-one met; the mayor put up Seagrave, and no other person was put up in nomination; nine of the twenty-one voted for Seagrave, but twelve did not vote at all, and eleven of them protested against any election being then held, the office being at that time, as they alleged, full of Foxcroft who is

whose right was then contesting in *K. B.*, and there was a written protest to that effect, which was signed by ten of them, the eleventh declaring that he suspended doing any thing; the mayor declared *Seagrove* duly elected, and swore him in accordingly: the Court were of opinion, that after the corporation was duly summoned, the election must be proceeded on, and that the only way to prevent the election from falling on any particular person was by voting for another; that this had not been done here; and that the mere protest was of no avail, and so confirmed the election of *Seagrove*.

5. "Where the election has been in pursuance of stat. 11 Geo. 2. the directions of the statute must be pursued, or the person is removeable by *quo warranto*."

For where no election had been had of the bailiffs of *Malden* on the charter-day, and on the day following, by virtue of the stat. 11 Geo. 2. divers of the then aldermen and head-burgessees, in whom the right of election was, met for the purpose of the election; at which meeting the defendant *Malden* (he being an alderman) did preside; he was elected, and at the meeting took the oaths of office before Jonas Malden, William Smart, and John Edwich, being three other senior aldermen of the borough, and was therefore admitted bailiff of the same: this election was adjudged to be void, on the ground that "by the words of the statute, the person elected is to take the oaths before the officer who shall preside at the election," which not having here been complied with, the election was void.

Rex v. Charles Malden,
4 Burr. 2130.

6. "Where the right of election to any office is given by an old deed to any number of persons, usage as to its construction and meaning is admissible evidence; and traditional evidence is admissible evidence in proof of usage."

Withnell v. Gartham,
4 Esp. N. P. Cas. 322.

Tamen quere, & vid. Rex v. Miller, 6 Term Rep. 268. where the Court were doubtful how far usage might be pleaded to assist the Court in the construction of a doubtful charter.

Rex v. Miller,
6 T. Rep. 268.

7. Where the right of election is in the inhabitants of any place or borough, a substitute in the militia having a dwelling-house in such place or borough, in which his family resides, though he is doing duty with his regiment at another place, and only comes occasionally to his own house, on furlough, is an inhabitant, and has as such a right to vote.

Rex v. Mitchell,
10 East, 511.

8. "Where the officer or corporator elected is to be sworn in before any officer of the corporation, there must be his assent to the swearing; it is not sufficient that it was done in his presence."

For where by the charter of *New Romney*, the mayor is to be sworn in before his predecessor; at the election there were two candidates, *Ellis* and *Whitchurch*: *Ellis* had the majority, notwithstanding which the mayor ordered *Whitchurch* to be sworn; upon which the town-clerk read the oath; and both *Ellis* and *Whitchurch* put their hands on the book and kissed it; it was ruled, that this was not a good swearing by *Ellis*, it being without the assent of the mayor.

Rex v. Ellis,
2 Stra. 994.

Case of the
Mayor of Pen-
ryn, 1 Stra. 582.

And though an officer *has been legally elected*, yet if the *swearing in has not been regular*, he shall be removed by *quo warranto*; for the swearing in is as necessary to a complete investment of his office as the election.

3. Of Elections void for Illegality of the Bye-Law under which the Election has been made.

If the defendant in an information *quo warranto* justifies under a bye-law, the validity of that bye-law decides the validity of the election; it will be therefore to be inquired, What bye-laws are good?

1. "Where the corporation is by charter, they cannot make bye-laws to restrain the number of those by whom the election is to be made by charter."

Rex v. Cutbush,
4 Burr. 2204.

As where by the charter of *Maidstone*, the corporation was directed to consist of a mayor, thirteen jurats, and forty common-council, who should have a power of making bye-laws; and it is directed by the charter, that the election of the common council should be by the mayor, jurats, and *commonalty*; a bye-law limiting the election to be by the mayor, jurats, and *sixty of the senior common freemen*, was adjudged to be a bad bye-law; for there was no power to make a bye-law depriving a part of those entitled to vote under the charter in the election of the common-council from exercising that right.

Rex v. Head & alts. Freemen of Helston,
4 Burr. 2515.

So where the power of making bye-laws was in the mayor and aldermen under the charter, which also settled the power of electing the burgesses to be in the mayor, aldermen, and *commonalty*; a bye-law restraining the election of the burgesses to the *mayor and aldermen only* is bad, though declared to be made *with the assent of the commonalty*; for the bye-law could not take away the right of election which was in the body at large under the charter, and the assent of the commonalty is of no avail, as they had under the charter nothing to do with the making of bye-laws for the borough.

2. "And on the same principle, a bye-law cannot narrow the number of persons *out of whom an election* is to be made; as for example, by requiring a qualification not required by the charter."

Rex v. Spencer,
3 Burr. 1827.

As where the election of the common-council was in the mayor, jurats, and *commonalty*: a bye-law limiting it to the mayor, jurats, and *to such of the common freemen who should have served for one year the offices of churchwarden or overseer of the poor*, was held to be bad, as not warranted by the charter.

Rex v. Coopers' Comp. of Newcastle-upon-Tyne, 7 T. Rep. 543.

So a bye-law made to restrain the number of apprentices to be taken by any of the members is void.

Vide *Rex v. Tappenden*, 3 East, 185.

And as they cannot by a bye-law take away from the corporation any of their rights neither can they add to them.

There

Therefore, where the election of a senior bailiff was to be made by a majority of a select body, a bye-law giving a casting vote to the presiding officer, in case of equality of votes, was held to be bad. Rex v. Ginever,
6 T. Rep. 732.

3. "But where the power of making bye-laws is in the body at large, they may delegate their rights to a select body, who so become the representative of the whole community." Per Lord Mansfield,
3 Burr. 1841.

And where by charter or prescription the mode of electing officers is not regulated, a power resides in the corporation to make bye-laws for their own regulation with respect to the elections. Newling v. Francis,
3 T. Rep. 187.

"And where a good bye-law is so made and adopted, the election must be made in pursuance of it, or the election will be bad."

As where by the charter of *Macclesfield*, the mayor is to be chosen out of the capital burgesses, by the capital burgesses, who are twenty-four in number; it was found that the usage had been for above fifty years preceding, for the common burgesses to put in nomination five of the capital burgesses, out of which the capital burgesses chose the mayor, and that this usage was by virtue of a bye-law, not now extant in writing: in this case the common burgesses put eight in nomination, out of which the mayor was elected; the Court agreed that the bye-law and usage was good, but that the election was void, for it had neither pursued the bye-law nor the directions of the charter. Barber v. Boulton,
1 Stra. 314.

4. "Bye-laws made under the foregoing restrictions, and whose object is to avoid confusion, and to provide for the better government of the corporation, are good."

For where on a mandamus to admit the plaintiff to the place of freeman of the fraternity of free-masons of *Durham*, the defendant returned, That by a bye-law made by the corporation it had been ordered, that every person to be admitted to the freedom of the city should be called at three several meetings of the mayor, aldermen, and wardens of the several companies, which meetings were held on stated days, and be there approved of; and that the plaintiff was not so called and approved of, and therefore could not be admitted; this bye-law was adjudged to be good. Green v. Mayor of Durham,
1 Burr. 128.

So where a bye-law was made by the corporation of surgeons, That no one should be admitted to the freedom of their corporation unless he understood Latin, it was adjudged to be good. Rex v. Corporation of Barber-Surgeons,
2 Burr. 892.

5. Corporations created by letters patent cannot make a bye-law creating a forfeiture, even though they have a power of making bye-laws. Kirk v. Nowell,
1 T. Rep. 118.

Nor can a corporation created by act of parliament unless such a power be given expressly. Ibid.

6. A power granted to a company exercising particular trade, to make bye-laws for the government of persons exercising that trade in a particular place, entitles them to make bye-laws binding on all persons following the trade in that place, though not members of the company. Butchers Company v. Mayor
1 H. Blac. 370

4. Of Elections void, as being made before improper Officers.

Rex v. Smart,
4 Burr. 2241.
ante.

1. By the charter the election was to be held before the *two* bailiffs; both in fact presided at the election; but judgment of ouster was afterwards had against one of them; this, it was held, destroyed the election.

Rex v. Nat.
Dawes,
4 Burr. 2277.

2. But if an information *quo warranto* is brought against a corporator, with a view of disfranchising those whose title depends upon his, he shall not be allowed by collusion with the prosecutor to let judgment go against him by default, for if the other corporators, whose right depends on his, apply to be admitted to defend, the Court will permit them on indemnifying him.

Rex v. Grimes,
5 Burr. 2598.
5 Ref.

3. In an information *quo warranto*, impeaching a title on the ground of judgment of ouster against the returning officer; the judgment is admissible, but not conclusive evidence against the corporator.

Rex v. Mayor
of York,
1 T. Rep. 66.

It is now held to be conclusive, if the party under whom the corporator derives title has judgment of ouster against him.

5. Of Elections void, by Matter subsequent.

Rex v. Goodwin,
Doug. 383.
n. 22.

1. "If a person is in possession of a corporate office, and is elected to another, the duties of which are incompatible with those of the former, the appointment to the latter office is equivalent to an amotion; and if the party continues to exercise it, he may be removed by an information *quo warranto*."

Rex v. Pateman,
3 T. Rep. 777.

For where an information was moved for against the defendant, to shew cause why he claimed to be an *alderman of Bedford*, he having been elected to the office of *town-clerk*; it appeared that the *town-clerk's accounts are allowed by the aldermen, and that he was a ministerial officer attending on the corporate courts and meetings, under the controul and direction of the aldermen*; the Court held, that this made the offices incompatible, and granted the information.

Milwood v.
Thatcher,
2 T. Rep. 80.

So where the defendant was a jurat of *Hastings*, and he was elected to the place of town-clerk, and it appeared that the office of the jurat was judicial, and that of the town-clerk ministerial in the same court, they were adjudged to be incompatible.

Rex v. Trelawney,
3 Burr. 5615.

But in this case it was decided, That the defendant who was steward of *West Looe* (an higher office as was alleged) being elected a capital burghers, did not avoid either office; for they were compatible.

2. "Where the admission of corporators is by the stamp-acts ordered to be on stamps, there must be an admission for each regularly stamped."

Rex v. Reeks,
2 Str. 716.

For where the defendant's admission appeared to be, together with five others, written on one stamped admission, but five other blank stamped sheets of admission were annexed to it, the admission was adjudged to be void.

OF THE PROCEEDINGS BEFORE THE COURT
OF K. B. IN GRANTING INFORMATIONS QUO
WARRANTO:

Under this head I shall consider, 1st, The mode of application to the Court: 2dly, The rules laid down by the Court granting informations of this nature: 3dly, The proceedings on the part of the defendant, and on the part of the crown: 4thly, Of the costs.

. Of the Mode of Application to the Court of King's Bench.

"1. It is enacted by stat. 9 Ann. c. 20. "That where any person shall usurp any corporate franchise or office, it shall be lawful for the proper officer, with leave of the Court, to exhibit an information *quo warranto* against him, at the relation of any person desiring it who shall be named therein, and on this the Court shall proceed; and if the rights of many may be determined, the Court may give leave to consolidate them."

Rex v. Collingwood & al.
1 Burr. 573.

2. "And if the persons against whom the informations have been filed are found guilty of such usurpation, the Court shall give judgment of ouster against them, and fine them, and also give costs to the relator: but if the defendant has judgment he shall have costs."

But no information *quo warranto* can be granted against any corporation, as a body, for any usurpation on the Crown, except in the name of the Attorney-General.

Rex v. Carmarthen,
2 Burr. 869.

The practice therefore under this statute, is to move for a rule to shew cause why an information in the nature of *quo warranto* should not be granted, &c. grounded on an affidavit, stating the usurpation; which rule must be served on the party, and on the return of it, the Court exercise their discretion.

Hawk. P.C. 126.

And the requisitions of the statutes are so positive, that the Court cannot dispense with them, though the application is by a stranger to the corporation.

Rex v. Brown,
East. 29 G. 3.
quot. 3 T. Rep.
574.

2. Of the Rules laid down by the Court of K. B. in granting Informations Quo Warranto.

1. "The Court will not grant an information *quo warranto* against a person exercising a corporate franchise, to which he has been legally elected, though he has committed an offence which might amount to a forfeiture, until he has been removed by the corporation."

For where the defendant was an alderman of Bedford, but had thirteen years before removed from the borough, and not resided in it afterwards, and it was sworn to be the usage of the borough, that every alderman removing from it, and not residing therein,

Rex v. Heaven,
4 T. Rep. 772.

therein, forfeited his office; the Court refused the application for an information *quo warranto* against him, *the corporation not having removed him.*

Rex v. Stacey,
1 T. Rep. 1.

2. "It is made a *quere* in this case, whether in any case a derivative title can be impeached where the person from whom it is derived died in possession of his office undisturbed; But it is decided, That such title shall not be impeached by those who have acquiesced and acted under it: And Justice Blackstone was of opinion, that a derivative title could not be so impeached, in any case where the party was dead under whom the defendant claimed."

Rex v. Spearing,
Lent Ass. Win-
chester, 1771.
quot. 1 T. Rep. 4.

For where the defendant derived his title under the Duke of Bolton, as mayor of Winchester, it was contended that the duke was not legally mayor, he not being an inhabitant at the time he was chosen, and so was not eligible; the duke was dead, and Justice Blackstone would not suffer them to go into evidence, whether he had been legally chosen or not, but whether he had been *de facto* mayor; which it appeared he had by the corporation-books.

Rex v. Bond,
2 T. Rep. 767.

3. Where the party relator stands in the same circumstances with the defendant, against whom he applies for a *quo warranto*, or where granting the information may disfranchise so many as may endanger the dissolution of the corporation, the Court will exercise their discretion, and refuse the information.

Rex v. Mortlock,
3 T. Rep. 300.

3. In a rule for an information against the defendant, the objection to his election was, that his election was on the same day he was proposed, whereas it should be on the following, under a bye-law made in 1766; in answer to this it was shewn, that the relator was party to an agreement by the corporation not to enforce this bye-law, and that if any one's title was impeached, who had been elected under it, that it should be defended at the public expence; the Court rejected the application on those grounds.

Per Lord Mansfield, Cowp. 507.

5. The titles of persons who are *de facto* members of a corporation, admitted, sworn, &c. in the actual enjoyment of their offices, cannot be impeached upon the trial of a *person elected by them.*

"But where there is no other mode by which the title of the electors can be questioned in the first instance, the rule does not apply; and the Court will grant an information against the elected."

Rex v. Mein,
3 T. Rep. 595.

As was this case, which was rule for an information *quo warranto* to shew cause by what title the defendant claimed to be portreeve of the borough of Exeter, and setting out the right of election to be in the Prince's tenants duly admitted, and stating that twenty-two out of the fifty persons sworn of the homage, who had presented the defendant for portreeve, had been improperly admitted; though this was impeaching their titles through that of the defendant, the Court granted the information.

Rex v. Stacey,
1 T. Rep. 1.
Rex v. Symmons,
4 T. Rep. 223.

6. The Court will not grant an information *quo warranto* on the application of a person who was present at and concurred in the defendant's election; but if many join in the application,

and one of them has not concurred in the election, if he will avow himself the relator, the Court will grant the information.

But this is not the case where the disability avoiding the election is a *latent one*; for where the application was on the ground that the defendant *had not taken the sacrament within a year before his election*, as required by stat. 13 Car. 2. stat. 2. c. 1. and it was opposed, on the ground that the person applying had concurred in the defendant's election; the Court held, that that objection held only where the relator *concurred in the election, knowing of the defect*; but that this was latent, an omission of an act required to be done by every person elected to an office, and not known at the time of the election.

Rex v. Smith,
3 T. Rep. 572.

7. On an information *quo warranto* against the defendants, to shew by what authority they acted as burgesses, having never been admitted; *the only action alleged was voting at the election for members of parliament*: the Court would not grant the rule, saying, that as they claimed a right to vote, that was only properly inquirable before the House of Commons.

Rex v. Harvey,
1 Stra. 547.

But in this case it is said, that it had been often ruled, that an information *quo warranto* would lie against a person claiming to have a right to vote by virtue of a burgage tenure.

Case of the Borough of Horsham, Hil. 30 G. 3.
quot. 3 T. R. 599.

8. On an application for an information *quo warranto* against the defendant, for not having taken the oaths of supremacy and allegiance, and made on the application of the town-clerk, who swore he had not administered them, though he made an entry stating that he had; the Court refused the application, as it would be a dangerous consequence to allow a town-clerk to disqualify members on his own oath, contrary to the record.

Rex v. Williams,
1 Stra. 677.

So where the application was, stating that the relator *believed* that the defendant was not duly sworn, and the affidavits on the other side *did not swear that he had been duly sworn in*, but only stated, *that he appeared from the books to have been duly sworn in*; the Court refused the application.

Rex v. Newling,
3 T. Rep. 310.

9. It was formerly settled as a rule by the Court of King's Bench, never to allow an information *quo warranto* to go against a person who had been twenty years in possession of his corporate franchise; but the Court had established it as a rule, that no information *quo warranto* should go where the party had been six years in possession; and that is now confirmed by statute.

Winchelsea's cases in Burr.
Rep. passim.
Rex v. Dickin,
4 T. Rep. 282.

It is enacted by stat. 33 Geo. 3. c. 58. "1. That to any information *quo warranto*, the defendant may plead that he has held "the office or franchise for six years preceding the information, "and such shall be a complete bar. 2. A title derived under "any election shall not be impeached by reason of any defect "the title of the person or persons electing, if such person or "persons were in possession *de facto* of his or their franchise or "office six years before the filing of the information. 3. The "officer having the custody of the corporation-books, must permit the inspection of them at all times."

10. As to the affidavits upon which the Court are to decide, it has been decided,

That

Rex v. Mein,
3 T. Rep. 496.

That if the relator's affidavit is defective in stating a material fact, but that fact is afterwards stated in the defendant's affidavit; the Court may use the latter affidavit in support of the prosecutor's application, as where the relator's affidavit omitted to state the mode of election, but which was done by the defendant.

3. Of the Proceedings on the Part of the Defendant, and on the Part of the Crown.

Hawk. P.C. 162.

1. On the return of the rule, the defendant may shew cause why the information should not go against him; and these are good causes:—That the right has been already determined by mandamus; that it has been acquiesced in for many years; that the defendant's right depends upon those who voted for him, which are then undetermined; that the franchise is of a private nature; or he may disclaim that he ever acted under his election, for there must be a user as well as claim, in order to subject the party to an information *quo warranto*; for the judgment is, that he be fined *pro usu & usurpatione*.

Rex v. Whitwell,
5 T. Rep. 85.
Rex v. Ponsonby,
M. 25 G. 2.
Buller N.P. 211.

Rex v. Leigh,
4 Burr. 2143.

2. In civil actions the plaintiff can only recover by the strength of his own title, but the defendant in *quo warranto* informations is bound to shew a good title in himself against the crown, or judgment will go against him; therefore where the defendant claimed, by two titles, prescription and charter, but relied on the first, which was found against him, though it was contended for him, that he might have a good title under the second, yet the Court gave judgment of ouster against him; for the Crown may take issue on any matter that may shew the defendant to have usurped the franchise, and *if one material issue be found for the Crown, it shall have judgment*.

Rex v. Latham
& al.
3 Burr. 1485.

“ And where the defendant relies on the title in a particular form, he must prove it as laid.”

Rex v. Mein,
4 T. Rep. 481.

For where the defendant made title to his admission of freeman of *Fowey*, on the presentation of *twenty-three* homagers, free tenants of the borough and manor, and on issue taken on that, it was found that *but two of them were of that description*, the issue was held to be found for the Crown, the plea being falsified.

Rex v. Blagden,
Gillb. Rep. 145.

5. The defendant's plea should set out his title at length, and conclude with a general traverse of *absq. hoc. quod præd. &c. usurpavit*, &c. and the crown should not take issue upon the general traverse, but reply to the special matter; for so the defendant knows how to apply his defence.

4. Of Costs.

“ The statute 9 *Ann. (ante)* is confined to cases of usurpations of corporate offices or franchises, and therefore where the information is at common law, there can only be judgment of ouster; but the Court cannot give costs.”

There-

Therefore where the information against the defendant was *Rex v. Williams*,
 “ *for holding a Court within the borough of Denbigh, which should* 1 Burr. 402.
 “ only be held by the bailiffs, of which he was not one,” and
 there was judgment against him; the Court held, that the
 relator could not have his costs, for this was not an usurpation
 within the statute of *Ann.*

ceive the interest: *Bostock* brought trover for them against the clerk, and *Lechmere* was called as a witness to prove the property; but it appearing that *he had given a bond to indemnify the company*, he was rejected by C. J. King on the ground of interest, *as being liable to the costs*: *Bostock* recovered in that action, and then *Ball* brought an action against him; and *Lechmere* being called as a witness, was objected to, because that if *Ball* should recover against *Bostock*, *that would be set in equity against the former recovery by Bostock against the clerk of the South Sea-house*: but the Chief Justice said, *that was too remote to exclude him from being a witness, and went only to his credit*; so his testimony was admitted.

Owen Han-
ning's case,
1 Mod. 21.

So where on a *scire facias* to avoid a patent, an exception was taken to a witness, because he was deputy to the persons who would avoid it; the exception was disallowed, because the suit here was between the king and the patentee.

3. "Though the witness may not have any interest in the cause wherein he is called as a witness, yet if in its event he may be *ultimately benefitted*, he shall be inadmissible."

As *ex gr.* if both party and witness claim any matter under the same title or in the same right; or if the determination of the cause depending, may perhaps prevent a suit against the witness.

East India Com-
pany v. Gossling,
M. 16 G. 2. cit.
1 T. Rep. 303.

As in actions upon policies of insurance, it has been said, that one underwriter cannot be a witness for another whose name is on the policy. This is so laid down in the 1 T. R., but *vid. S. C. 4 Burr. 2245.*, where it is said that it was decided, That the objection went only to the credit, not to the competency of the witness. *Vide Bent v. Baker, 3 T. Rep. 27. & post. 714.*

French v. Black-
house,
Same v. Foulston,
5 Burr. 2727.

So where the two defendants were part-owners of a ship, of which the plaintiff was husband, and appointed to that office by a deed executed by all the owners, by which deed they empowered him to expend money generally for the use of the ship; he insured for all the owners, and brought separate actions against two of them: they were each of them charged for the amount of the whole sum. On the trial of the first action, the defendant in the other action was called as a witness; Lord *Mansfield* rejected him as incompetent; and on a motion for a new trial, the Court concurred with him.

Corporation of
Carpenters, &c.
of Shrewsbury
v. Hayward,
Dougl. 359.

So where the action was against the defendant for following a trade against the custom of the town of *Shrewsbury*, without being free of one of the companies, the plaintiffs in this action; a witness was called to prove that *he had worked in Shrewsbury* without being so admitted a member of any of the companies, and so to disprove the existence of the custom: he was held to be an inadmissible witness; for though not immediately interested in the event of the suit, yet by the company's failing in establishing the custom, he and others who had been guilty of a breach of it, would be discharged from actions to which they were liable.

On this principle, the tenant in possession is not admissible, as a witness for his landlord in ejectment. (*Ante*, ch. of *Ejectment*.)

So where the question is respecting the rights of lords of customary manors, the lords of other customary manors are inadmissible witnesses, because the question concerns a general right.

The case of *commoners* comes within the rule now mentioned; as to whom it is laid down generally, that one commoner cannot be a witness for another; but the admissibility of their testimony seems better founded on this rule: If the issue be on the right of common, which depends on a custom pervading the whole manor, the evidence of the commoner is not admissible, because, as it depends on a custom, the record in that action would be evidence in a subsequent one brought by that witness to try the same right: but the reason does not hold, where the common is claimed by prescription in right of a particular estate; because it does not follow, that if *A.* has a prescriptive right of common belonging to his estate, that *B.* who has another estate in the same manor, must have the same right; neither would the judgment for *A.* be evidence for *B.*

1 Stra. 658.
Per Buller, Just.
1 T. Rep. 302.

But it is no good exception to a witness, that he has common *pur cause de vicinage* of the lands in question; for that is no interest but an excuse of a trespass.

Bull. N. P. 285.

"The case of *parishioners*, in parochial questions, may be considered as an exception to this rule."

Rex v. Kirdford,
2 East, 559.

As to the admissibility of a *person liable to be rated, but not actually rated*, as a witness, in a question on an appeal respecting a poor's rate; it was held in this case, that such person is a good witness, though he may be ultimately benefitted by extending the rate to others. Perhaps it is on the ground that *it is uncertain* whether he will receive the benefit or not, as *per Lord Kenyon* in this case: The poor's rates are made for a short space of time only; and persons who are liable to be rated one month, may not be so the next.

Rex v. Proffer,
4 T. Rep. 17.

The first case in which the question occurred, was before Baron Burland at *Salisbury*, in which in an action on a penal statute, which gave part of the penalty to the poor of the parish; a person was called as a witness, who was liable to be rated to the poor, but was not rated; he was objected to, but the Judge overruled the objection, holding *liability to be rated to be no objection*.

Per Buller, Just.
4 T. Rep. 20.

But upon a question of settlement between two parishes, a parishioner who had property in the parish, but had it rated in his son's name for the purpose of making him a witness, was held to be incompetent.

Rex v. Kildesby,
10 East, 292.

That should appear to be on the ground of fraud, as otherwise he would be a good witness.

Rex v. South
Lynn, 6 T.
Rep. 667.

So in an action on a bond entered into by the defendant as security for a person on his being appointed collector of watch rate, &c.; the vestry clerk was called as a witness: on his being asked if he was not liable to be rated, he answered, that he supposed he was; but that it had never been usual to rate the vestry clerk; and his evidence being objected to on this, Lord Kenyon held, That

Chivers v.
Brant,
Espin. N. P. Cas.
175.

the rule laid down in *Rex v. Prosser* equally applied to a case of this nature; and he was admitted.

Deacon v. Cook,
Taunton Sp. Aff.
1809, 2 E. 562.

So on a question of boundary between two parishes, a parishioner not rated, was held to be a good witness.—*Aliter* if rated.

4. "It has been held that if a witness *thinks himself interested*, that is, that a benefit will arise to him from his testimony, though in strictness of law he has *no right* to such benefit, he should not be admitted as a witness."

Fotheringham
v. Greenwood,
1 *Str.* 129.

As where *A.* having money of the plaintiff's in his hands, lost it at play; the plaintiff brought his action on the stat. of *Ann.* against the winner, and produced *A.* as a witness: upon a *voir dire* he confessed, that if the plaintiff recovered, he was not to be answerable; but if he failed, that the money was to be deducted out of his fortune in the plaintiff's hands. *Per Pratt C. J.*—Though the recovery in this action will not sink the demand against *A.* for the money he has embezzled, yet as in his apprehension the plaintiff will not trouble him for it in case he recovers, it is a bias on him; and if he thinks himself interested he ought not to be sworn.

Ibid.

In the same case Serjeant *Darnall* mentioned the case of a Mr. *Chapman of Bucks*, who owning himself to be under an honorary, though not a binding obligation to pay the costs of the action in which he was produced as a witness; *Parker C. J.* on solemn debate rejected him.

Pedderston v.
Stoffles,
1 *Campb.* 144.

These cases have however been overruled, and an honorary obligation was in this case held to be no objection to the competency of a witness.

5. "The interest which amounts to a disqualification must, it seems, mean the obtaining of some profit bettering the witness's condition or estate; *not the interest arising from establishing an higher character, or exculpating himself from a charge of misconduct or neglect.*"

Taylor v.
Woodnefs,
Sittings G. Hall,
Hil. 4 G. 3.
MSS.

Therefore where in an action on a policy of insurance, with warranty to depart with convoy, in which the plaintiff was non-suited, the ship having neglected to obey the signals made for joining the convoy, in consequence of which she had been captured; some imputation was attempted to be thrown on the captain of the convoy: he was called then as a witness and objected to, on the ground that he was interested to support his own conduct; but Lord *Mansfield* over-ruled the objection, saying that he had often done so before.

Per. L. Mans-
field,
1 *Term Rep.*
300.

6. "It has been said, that no person who has signed a paper or deed shall be permitted to give a testimony to invalidate it; for every man who is party to any instrument gives a credit to it, and by such means he might discharge himself. And this is the case, though he has no *immediate interest* in the event of the suit in which he is called."

Walton Aff.
of Sutton v.
Shelley,
1 *Term Rep.*
296.
Rex v. Rhoder,
2 *Str.* 728.
S. P.

Therefore where in debt on a bond the defendant pleaded usury: it was proved, that the bond had been given in consideration of the delivering up two promissory notes, which had been indorsed to *Sutton* the bankrupt, and one of the indorsers on which was a person of the name of *Davenport Sedley*; to prove that the consideration of the notes was usurious, the defendant called *Daven-*

port Sedley; but he was rejected as an incompetent witness, on the ground that he came to impeach an instrument on which his name appeared; though it was admitted, that in point of interest he had none, or that it was rather against his interest; as if the bond was established, the notes upon which his name appeared were at an end.

The doctrine laid down in this case seems rather invalidated by a decision of Lord *Kenyon's* in *Rich v. Topping, Espin. Cas. N.P. 176.*, which was an action on a bill of exchange, the defence to which was, that the consideration of the bill was an usurious transaction, to prove which the drawer, who was also the indorser, was called as a witness, and objected to on the authority of that case; but Lord *Kenyon* over-ruled the objection: his Lordship said, That the verdict in this cause could never be given in evidence in any action afterwards, to be brought against the witness as drawer of the bill, so that he was completely uninterested in the event of the action; and on his receiving a release from the acceptor, his Lordship admitted him.

But in a similar case in the Common Pleas, *Buller, J.* said, That the rule in the case of *Walton v. Shelley* had been laid down by Lord *Mansfield*, and decided by the Court, and that he would adhere to it; and accordingly rejected a witness under similar circumstances.

But the point is now completely settled, that a party to a bill or note may be called to invalidate it, and prove it void on its creation.

"But where a person is uninterested in the immediate question between the parties then litigating; as for example, if he is at all events liable himself, he may be called to impeach that instrument upon which his name appears."

Therefore where the plaintiff declared as indorsee of a promissory note drawn by *Foster Charlton*, payable to the defendant, dated the 13th of June 1775; the defendant insisted, that the date of the note had been altered from the 3d to the 13th; and to prove it, called *Foster Charlton*: Lord *Mansfield* admitted him, as at all events he was liable to pay the note.

"But though the law is laid down generally by Lord *Mansfield* (*supra*), That no person shall be admitted to give a testimony to invalidate any instrument which he has signed; yet in the same case Justice *Buller* confines it only to negotiable instruments; and this distinction is recognized by Lord *Kenyon*, 3 Term Rep. 34.; in which his Lordship mentions as an instance, that witnesses may be called to give evidence against their own attestation, where the instrument was not negotiable, the case of *Joliffe's will* (*Lowe v. Joliffe*, 1 Black. Rep. 365.); and so one witness has been allowed to prove the execution of a will attested by three witnesses, which the other two have denied. So that to negotiable instruments only the rule should be confined: though the rule as to these seems now to be the same as in all other instruments." *Ante* 210.

"So neither shall a person be allowed to give testimony as to the illegality of a transaction, in which a personal trust or confidence has been placed in him."

Hart v. McIntosh,
Espin. Cas. N.P.
298.

Jordaine v. Lashbrooke, 7 T.R.
601.

Levi v. Essex,
Sittings Westm.
Mich. 1775.
MSS.

Vid. Bowman v. Nicholl, ante.

4 Burr. 2225.

Holt v. Tyrrell,
Pasch. 3 G. 1.
B. R. at bar.
Bull. N. P. 484.

Therefore where to debt on a bond the defendant pleaded the stat. 5 & 6 Edw. 6. against the sale of offices, and upon the trial, the person who had been entrusted to make the bargain, and to keep it secret, was called as a witness to give an account for what the bond was given; Lord *Holt* refused to admit him, it being to abuse and betray his trust.

7. "If a person claims a property in the instrument upon which the action is brought, that is such an interest as shall render him incompetent, even with a release."

Buckland v.
Tankard,
5 Term Rep.
578.

As where in assumpsit by the plaintiff as indorsee of two promissory notes against defendant as acceptor, the defence was, that the bills were accommodation paper, which was known to the plaintiff, and that he had given no consideration for them; the indorser of the bills was called as a witness, he having been released: he proved that having accepted two bills for *Tankard* the defendant; *Tankard* had accepted the two bills in question for him as a counter-security; that he, being unwilling to press *Tankard*, or sue him in his own name, requested the plaintiff to take the bills, to pretend to *Tankard* that they had been indorsed to him for a good consideration, and to threaten to sue him if they were not paid; that the plaintiff consented, and that he then indorsed them to the plaintiff, but had never received any consideration for them; that the plaintiff had commenced this action in breach of his agreement, and that the bills were *bond fide* his (the witness's) property. Upon this Lord *Kenyon* said, his evidence was inadmissible, as he had an interest upon which the release could not operate; for that if the plaintiff succeeded in this action, the bills were *functi officio*, and so were lost to him; but his testimony went to defeat the plaintiff's action, in which case the bills will remain undischarged, so that by impeaching the plaintiff's title he set up his own, and was therefore interested: his Lordship's opinion was afterwards confirmed by the Court of *K. B.*

"But a suggestion that a witness may be liable, shall not incapacitate."

Birt v. Hood,
Espin. Cal. N. P.
23.

In an action for goods sold and delivered, the defence was, that the defendant's mother carried on the business, and that the goods for which the action was brought was furnished to her and on her credit: it was asserted by the plaintiff, that though the mother did so carry on the business, the defendant was a partner with her in it. The mother was called as a witness to prove the defendant's case: it was objected to her testimony being received, on the ground that, being a partner, and therefore liable to contribution in case the verdict went against the defendant, she was thereby rendered incompetent; at all events that some other witness should be called to prove that there was no partnership subsisting. *Byre*, C. J., over-ruled the objection, holding that as the plaintiff had proceeded against the defendant only, he could not now upon that surmise incapacitate the witness, who came to charge herself.

8. "On the same principle, in no case can the plaintiff or defendant be a witness in his own cause, as he is most immediately interested;

"interested; therefore an answer in equity is of very little weight where there are no proofs in the cause to back it; but if there be but one witness against a defendant's answer, the Court will direct a trial at law to try the credibility of the witness; and in such case will order the defendant's answer to be read to the jury."

Bull. N.P. 285.
Alan v. Jordan,
1 Ver. 161.
3 Chanc. Caf.
123. S.P.

And a rated inhabitant of a parish is a party in an appeal respecting the settlement of a pauper in that parish, and may object to be examined; neither does he come within the stat. 46 Geo. 3. 37. (post 232.) so as to be compellable under that statute to be examined, but he may absolutely refuse to answer.

Rex v. Inhabitants of Woburn,
10 East, 395.

Neither can they be witnesses for or against each other.

"That is, that one party cannot by calling the other make him a witness, for he may object to be examined."

But if a material witness for the plaintiff be made by mistake a defendant, the Court will, on motion, give leave to omit him, and strike his name out of the record even after issue joined; for the plaintiff can in no case examine a defendant, even though nothing be proved against him.

1 Sid. 441.
Bull. N.P. 285.

Therefore where on an information for a misdemeanor, the Attorney General would have examined a defendant as a witness for the king, the Court refused to admit him; he then entered a *noli prosequi*, and then examined him. *Vid. Cosgrove v. Hill, ante.*

Bull. N.P. *ibid.*

So where two were indicted for an assault, and one submitted, and was fined one shilling, the C. J. admitted him as a witness for the other.

Rex v. Fletcher,
1 Str. 533.

And where several are charged with the same offence, and no evidence given on the part of the prosecution to affect one of them, he is entitled to an acquittal before the others are called on for their defence in order to enable them to avail themselves of his testimony.

Cafe of Ship
Bounty, 1 East,
313.

But if any person be arbitrarily made a defendant, in order to prevent his testimony, it is said, that if there is no evidence against him, he may be sworn and examined as a witness; but *quere*, If there should not be a verdict taken for him, as it said before, that a defendant cannot be a witness on either side? and in this case it is said, that if a material witness for the defendant in ejectment be made a defendant, the right way is for him to let judgment go by default; for if he pleads, and by that means admits himself to be tenant in possession, the Court will not on motion afterward strike out his name; but in such case, if he consents to let judgment go against him *for so much as he is in possession of*, there seems no reason why he should not be admitted as a witness for another defendant.

Bull. N.P. 285.

Dormer v.
Fortescue,
Mich. 9. G. 2.
Bull. N.P. 258.

"If an action is brought against one defendant for a cause of action *simul cum* others, those persons may be witnesses for the defendant; but *aliter*, where they have been made parties to the suit."

In trespass the defendant pleaded *actio non*, &c., for that Richard Newson named in the *simul cum*, paid the plaintiff a guinea in satisfaction;

Poplet v. James,
Trin 5 G. 2.
Bull. N.P. 268.

satisfaction; on issue thereon, the defendant produced *Mawson* and C. J. *Eyre* admitted him as a good witness; for what he was, to prove could not be given in evidence in another action, and in effect he was making himself liable by swearing he was concerned in the trespass.

Reason v. Ewbank,
Hil. 1. G. 1.
per Bur. Just.
&c. Str. 19.
Bull. N. P. 286.

But it was decided in this case, that if the plaintiff could prove the persons named in the *simul cum* in the trespass guilty, and parties to the suit, which must be by producing the original or process against them, or proving an ineffectual endeavour to arrest them, or that the process was lost, the defendant in that case cannot have the benefit of their testimony.

9. But though interest is thus a complete objection to the competence of a witness, yet it is to be taken with some exceptions.

1. In *criminal prosecutions* a party interested may be a witness.

It was formerly held, That where a party liable to a civil cause of action preferred an indictment for the same cause of action, in order to defeat it, that such person was an incompetent witness.

Rex v. Whiting,
Salk. 283.
Mich. 10. W. 3.

And accordingly, in an information for a cheat, the case was that the defendant had a promissory note for 5l. from his mother-in-law, but by some slight got her hand to one for 100l.; it was ruled by C. J. *Holt*, That the mother-in-law could not be a witness, being concerned in the event of the suit, for that if sued on the note for 100l, a conviction of the defendant on this indictment would influence the jury, though the conviction could not be given in evidence before them.

Rex v. Nunez,
2 Stra. 1043.
Pas. 9. G. 2.
Rex v. Ellis,
2 Stra. 1104.

So in an indictment for perjury in an answer to the exchequer, by which the defendant swore that a note on which he had sued the plaintiff was to be put in suit, and that there was no agreement by which he bound himself not to sue the plaintiff, who had filed an injunction bill in the Exchequer on that ground; Lord *Hardwicke*, C. J., refused to allow the plaintiff to be a witness.

Rex v. Eden.
Espin. Cal. N. P.
97.

In an indictment for perjury in what the witness swore on a former trial, the party against whom the verdict went in consequence of such testimony was held to be inadmissible, until he had paid the debt and costs in that action, as in case of a conviction, a court of equity would relieve him against the judgment given in that action, it having been obtained by perjury.

Per Ld. Mans-
field,
4 Burr. 2255.

But since these cases, great light has been thrown upon the distinction between interest which affects the competency of a witness, and influence which only goes to his credit. In the case of *Rex v. Bray*, Hil. 1736, Lord *Hardwicke* shook the authority of the *King v. Whiting*, and that of the *King v. Nunez*, which he himself had decided; and afterwards in the case of the *King v. Broughton*, 2 Stra. 1229., C. J. *Lee* over-ruled the cases of *Rex v. Whiting*, *Rex v. Nunez*, and *Rex v. Ellis*, above cited.

Rex v. Boston,
4 East, 572.

And in this case it was expressly decided, That where a party against whom an action was brought, had filed a bill in equity against the plaintiff in that action, which the plaintiff having answered, the injunction was dissolved, and the defendant in the action indicted him for perjury committed in his answer; that on the

the prosecution for perjury the defendant was a good witness to prove the perjury, as he could not avail himself of the conviction of the plaintiff in any civil proceeding at law or in equity.

The rule, therefore, as laid down by Lord Mansfield, was, "That the question in a criminal prosecution being the same with a civil cause, in which the witness was interested, went generally to his credit, unless the judgment in the prosecution where he was a witness could be given in evidence in a cause in which he was interested:" in which case I conclude he would be incompetent.

Therefore in an action on an usurious contract; to prove the usury, the borrower of the money was called: after having proved the usury, he was objected to as incompetent, unless the repayment of the money was proved, and that he was not competent to prove the repayment of it; but it was resolved, That he was a competent witness to prove payment of the money borrowed; for neither what he swore in this action, nor the recovery, could be evidence in an action of debt for the money; and it was also held, That he was competent to prove the usurious transaction: though it would be liable to a different consideration, if the defendant could produce the security, or prove the debt unpaid.

"But though it is said that in the *King v. Bray*, *supra*, it was first held, That a person interested was admissible as a witness, yet that seems not correct; for in many cases before that time, a person interested was admitted as a witness in cases of necessity."

For where in an indictment for a cheat done to *J. S.* by imposing upon him a quantity of beer, mixed with vinegar and grounds of coffee, for port wine; *C. J. Holt* allowed *J. S.* to be a witness to the fact on the trial; for that in such private transactions nobody else could be a witness to the circumstances of the fact but he who suffered.

So on an indictment for tearing a note, whereby the defendant promised to pay *A. B.* so much; *A. B.* was produced as a witness; he was objected to on the ground that he was swearing to set up his own demand, because that if the defendant was convicted, the Court would compel him to give a new note; but *C. J. Pratt* admitted him.

So in this case it was said by *C. J. Holt*, That if a woman give a bond or note to a man to procure her the love of *J. S.* by some spell or charm; that on an indictment for a cheat, she shall be a witness, though it goes to invalidate and destroy the bond or note; for the nature of the transaction admits no other evidence.

2. "A second description of persons interested who are legal witnesses, are those who by statute are declared to be so, notwithstanding the interest: or those whom the policy of statutes giving them an interest requires to be so admitted."

1. As by stat. 27 G. 3. c. 29. "It is enacted, That in actions on penal statutes, inhabitants of any place or parish are good witnesses to prove the offence, notwithstanding the penalty be given to the poor, or otherwise for the benefit of the parish or place, provided the penalty does not exceed twenty pounds."

Abrahams v. Bunn.
4 Burr. 2257.
Smith v. Prager,
7. T. Rep. 60.
Shank v. t. v.
Payne.
1 Stra. 633.
contra.

Rex v. Mase,
kartney,
Salk. 286.
Mich. 2 Ann.

Rex v. Moise,
1 Stra. 595.
Trin. 10 G. 2.

Per Holt,
7 Mod. 119.

Rex v. Davis,
6 T. Rep. 177.

1. The inhabitants of the county at large being bound to repair bridges, (except where any person is obliged to repair *ratione tenuræ*,) in which case the inhabitants of the county could not be witnesses on indictments for not repairing them; it was therefore enacted by stat. 1 Ann. 88., "That on all such indictments, either in the courts at *Westminster*, or at the *Quarter Sessions*, the evidence of the inhabitants, being credible persons of the town, corporation, county, or riding, in which such decayed bridges or highways leading to them lie, should be taken and admitted in all such cases."

By stat. 13 G. 3. c. 78., the Highway Act, the overseer is by § 69. declared to be a competent witness in all cases of matters arising under the act, though his salary may arise in part out of the fines and penalties.

3. By stat. 8 G. 2. c. 16. § 15. it is recited, "That no person inhabiting within the hundred could be admitted as a witness for or on behalf of the said hundred on actions brought against them on the statute of *Winton*; it therefore enacts, that all such persons may be witnesses in such actions."

4. By stat. 3 & 4 W. 3. c. 11. it is enacted, "That in all actions brought in the courts at *Westminster*, or at the assizes for money mis-spent, or taken by the churchwardens or overseers of the poor, the evidence of the parishioners, others than such as take alms, shall be taken and admitted."

To this class of cases may be added, That of admitting a party against whom an action for bribery is brought under stat. 2 G. 2., and who by discovery of another who has been guilty of bribery discharges himself. He is a good witness, for unless a witness, he could not be instrumental in convicting another.

5. On an indictment for perjury, if the indictment is at common law, the party injured may be a witness (*ante*); but where the indictment is on the statute, the party injured cannot, for the statute gives him 10l.

6. But the law has admitted many persons to be witnesses, whom interest might otherwise incapacitate, as in cases of offences for which a reward is given; as statute 4 & 5 W. 3. c. 8. for apprehending highwaymen; 5 Ann. c. 31. for apprehending burglars, &c., notwithstanding which the prosecutors and persons apprehending those guilty of these offences, are good witnesses on indictments for those offences.

So where the indictment was against a Roman Catholic priest for assisting in celebrating mass; the prosecutor was produced as a witness, but was objected to, a reward being given to any person who should convict a Popish bishop or priest of that offence: Lord Mansfield over-ruled the objection, and said it was the constant practice to admit the prosecutors on an indictment for a highway robbery or burglary, though they are entitled to the reward.

3. "A third case in which a party interested may be a witness is from necessity, where no other evidence can reasonably be expected to be had."

Bull. N. P. 289. As in an action on the statute of *Winton* against the hundred, the

Howard v.
Shipley,
4 East, 180.

2 Hawk. P. C.
433.

Rex v. Dylone,
5 Pitt, West. Tr.
7 Geo. 3.
Onslow, N. P.
257.

ie person robbed may be himself a witness. *Vid.* Preamble, 15 stat. 8 G. 2. c. 16. *ante*, 712.

So the party escaping may be a witness to charge the gaoler with an escape; for it is a matter privately transacted between the party and the officer, of which there could be no other evidence.

Rex v. Ford,
3 Salk. 690.

So where the question was, Whether the defendants had a right to be freemen? though it appeared there were commons belonging to the freemen, yet an alderman was admitted to prove them no freemen, it appearing that none but aldermen were privy to the transactions of the corporation respecting the making persons free.

Rex v. Phipps & Archer,
Cambr.
Per Lee, C. J.
Bull. N. P. 289.

So where the question was, Whether the master had deserted the ship *Suffex*, without sufficient necessity? a sailor, who had given bond to the master (as a trustee for the company) not to desert the ship during the voyage, was admitted an evidence for the master, it appearing that all the sailors had entered into such bonds.

East India Company v. Gosling,
16 G. 2.
Bull. N. P. 289.

So where a son, having a general authority from his father to receive money, received a sum of money belonging to his father, and gave it to the defendant: in trover for it by the father, the son was held to be a good witness by C. J. *Holt*, his testimony being corroborated by other circumstances.

Anon.
Salk. 289.

4. "A fourth case in which a witness interested may be admitted to give his evidence, is grounded on the usage of trade, and the usual mode of business."

As a porter is a good witness to prove the delivery of goods; a banker's clerk the payment of money.

Bull. N. P. 289.

So where a banker's clerk had overpaid a bill, on *assumpsit* brought for the money by the banker, the clerk was *ex necessitate* and from the usage of trade admitted as a witness, though in case the money had not been recovered, he must have made it good.

Martin v. Horrell,
1 Stra. 647.

So a factor who made the agreement was held to be a good witness to prove the delivery of goods according to agreement, though he was to have a shilling in the pound on the amount of the goods; for he was a mere go-between, and so might be a witness for either party.

Dixon v. Cowper,
3 Will. 10.

And in a similar case, where a person was employed to sell a quantity of indigo for the plaintiff, and by agreement was to have for his own profit whatever sum he could get for the indigo above 8. 6d. *per* pound, which price the plaintiff had fixed himself, and not an allowance of so much *per cent.* on the sale, as was the usual way; he was held to be a good witness without a release, and the authority of the last case.

Benjamin v. Porteus,
2 H. Blackst.
590.

5. "A fifth case in which an interested person may be a witness, is where the party is become interested by his own act, after the party who calls him as a witness has a right to his evidence."

As where in *assumpsit* on a policy of insurance, the defendant (the underwriter) produced one *Bowden* as a witness: he had been the broker employed by the plaintiff to get the policy effected, and after

Pent v. Baker,
3 T. Rep. 27.

after it had been so underwritten by the defendant, he underwrote it himself; on this ground he was objected to; but he was nevertheless held to be a competent witness; for having been employed as broker, from the nature of his situation he was the best witness that could be of the transactions; and therefore he should not be allowed to deprive the parties of the benefit of his testimony by any act of his own; particularly as so by collusion with the assured, by putting his name on the policy, he might defraud the other underwriters, by depriving them of the benefit of his testimony to facts which might avoid the policy.

Barlow v. Vowell,
Skin. 586.

“ For the objections in these cases go only to credit.”

As if a person be a witness to a wager, upon which an action is brought; if he has laid a wager on the same matter at the same time, he is not admissible as a witness; but if the wager was laid by the witness afterwards, he is a good witness.

Rex v. Fox,
1 Stra. 651.

So on an indictment for an assault, it was proved that the prosecutor had laid a wager that he would convict the defendant; he was held to be a good witness, though it went to his credit.

6. “ A party interested may be a witness where his interest is very remote or trifling.”

As in the cases ante.

Rex v. Mayor
of London,
2 Lev. 231.
Tamen quære,
If this case be
law?
Bull. N. P. 290.
2 Vern. 317.

So in this case, which was an information *quo warranto*, for taking one penny *per chaldron* on all coals brought into London; the defendants prescribed for the duty; freemen were admitted to prove the prescription, it appearing that all the profits went to the mayor and sheriffs, though they had it for the benefit of the corporation of which the freemen are all members; yet they having an interest so small and so remote, were held to be admissible witnesses.

The above case is put with a *quære* as to its legality; and it seems not to be law from the following case:—

Burton v. Hinde,
5 T. Rep. 174.

In trespass for breaking and entering the plaintiff's close, which was formerly part of the waste of *Kingston*, the defendant justified under a right of common: the plaintiff replied an approvement under the statute of *Merton*, which had been made by the corporation of *Kingston*, who were lords of the manor, and had inclosed it out of certain waste land in which the defendant and others had a right of common, reserving a rent to the corporation. The issue was on the sufficiency of common left: to prove it the plaintiff offered to call certain *freemen of the corporation*; they were objected to and rejected, and the plaintiff was nonsuited. On a motion for a new trial it was contended that they were admissible; 1st, Because the rent was reserved to the mayor and bailiffs, and that therefore the freemen having no disposition of the corporate funds, had no interest at all: 2dly, But if they had, that it was too minute to operate as an objection to their testimony; but *per Curiam*—The rent must be reserved to the use of the corporation, and therefore the objection must prevail, however small the interest.

“ So if the interest is trifling.”

On an information *quo warranto* against the defendant as mayor of Tintagel, issue was joined on this custom, *viz.*—That at a court-leet, annually holden on the 10th of October the mayor for the year ensuing is to be chosen, and for that purpose two elizors are to be nominated, one by the mayor, the other by the town-clerk; these elizors are to nominate twelve jurors, who are to present the mayor for the year ensuing, and in case the town-clerk refuse to nominate his elizor, that then the mayor may nominate the second elizor; the town-clerk did not nominate, upon which the mayor nominated *P. Hoskins: this man, and another who had served as a juror*, were offered as witnesses at the trial to prove the custom, but rejected *in toto* as incompetent; but *per Lord Hardwicke*, on a motion for a new trial, which was granted—The having an elizor is intended as a franchise in the borough; but in the elizor himself *it is only an authority, and the execution of it past and over*. He said he knew no case where a man who has acted under a bare authority has been refused to prove the execution of it: persons who have been themselves in office are often called to shew what the usage is, what they did when in office; and yet if their acts are not legal, they are liable to informations *quo warranto*.

Rex v. Bray,
Hil. 10 G. 2.
Bull. N. P. 290.
Rex v. Robins,
2 Stra. 9069.
S. C. Semble-
ment.

And in the last case, *Ld. Hardwicke* recognized this case as good law, *viz.* that in an issue to try whether by the custom of the manor, the tenants were to pay fines to the heir or successors of the lord during his minority, and be re-admitted upon the death of the last admitting lord, the steward was admitted to prove the custom, *though he had fees on the admission*.

Champion
v. Atkinson,
3 Keb. 90.

So a person who had sold an estate without any covenant for good title or warranty, was allowed to be a witness to prove the title of the vendee.

1 *Sira*. 445.

7. Persons who are mere trustees, and sued in their corporate capacity, may be witnesses in actions brought against the corporation; as was held in an action against the defendants, as governors of the Foundling Hospital, for digging a well; some of the governors were allowed to be examined as witnesses, on the ground of their being sued in their corporate capacity, and so could not be liable out of their own estates.

Weller v. Go-
vernors of the
Foundling Hos-
pital, Peake,
N. P. C. 153.

But where they are themselves first liable for costs, they cannot be admitted, as was the case of trustees under a parish act of parliament, the act having given the sessions power to award costs against them, though they might afterwards call upon the parish to reimburse them; they were held to be inadmissible witnesses, for *per Lord Ellenborough*, though there are cases where persons clothed with a naked trust have been admitted as witnesses; there is no case where a person who was party to the suit, and liable individually to costs, has been admitted.

Rex v. Gover-
nors of the Poor
of St. Mary,
Bermondley,
3 East, 7.

8. “And lastly, however a person may be interested, if before he gives his testimony he parts with his interest by a release or otherwise, he is restored to his competency.”

As a legatee is a good witness *against a will*, for he swears against his own interest, which he parts with by impeaching the will.

Oxendon v.
Prentice,
2 Salk. 691.
1 Burr. 423.

So a legatee by a release is a good witness to establish a will.

So

Bent v. Baker,
3 T. Rep. 27.

So in this case (*ante*, fol. 217.) where the broker, who had also underwritten the policy, was called as a witness, and was objected to on the ground, first, That he *expected to be called on for part of the expence of defending the action, in which he was called as a witness*; and secondly, That he had joined the defendant and the other underwriters in a bill in the Exchequer for a discovery of matters respecting the policy, and for avoiding the same, which bill was then depending, and to the expences of which he was liable; it was adjudged, *That the defendant by executing to him a release of all costs at law and equity, paying the plaintiff his costs at law and equity, and procuring the bill in equity to be dismissed, restored him completely to his competence.*

**Goodtitle, lessee
of Fowler, v.
Welford,**
Doug. 134.
Lowe v. Jolliffe,
1 Black. Rep.
365. S. P.

So where in ejectment by a devisee under a will, one *Hearle*, who was named executor in the will, and was also devisee of a reversionary interest expectant on an estate for life, in some copyhold lands part of the estate devised, was called as a witness on the part of the plaintiff to prove the sanity of the testator, which was impeached by the defendant; to obviate the objection of interest, *he had surrendered his estate in the lands to the use of the heir at law*, but he had refused to accept it: it was resolved, that by parting with his interest his competency was restored, nor should the heir, by refusing to accept the surrender, deprive others of the benefit of his testimony.

“ But the release which shall operate to render a witness competent, must be such as to leave him not chargeable, or liable to no demand arising out of the matter in litigation.”

**Masters v. v.
Drayton,**
2 T. Rep. 496.

For in this case, an action *qui tam* for usury against the defendant, who was assignee of *Lightfoot* a bankrupt; *Lightfoot* was called as a witness: on his *voire dire*, he confessed that he had not obtained his certificate, nor repaid the money, but that the defendant had proved the debt under his commission; *Lightfoot* offered a release of all claim of allowance, surplus, &c. to his assignees, but he was nevertheless rejected as incompetent; for, the bankrupt not having got his certificate, remained still indebted to his assignee, the defendant; so that notwithstanding the release, he might still arrest him for the whole debt at law.

Vide, as to witnesses in the several actions, the different chapters of *Assumpsit*, *Debt*, &c.

2. Of Persons inadmissible as Witnesses from Situation, as standing in some Relation to the Parties in the Cause.

These are, 1. Counsel and attorneys: 2. Husband and wife.

1. How far Counsel and Attornies may be Witnesses.

Lindsay v. Talbot,
Trin. 12 G. 1.
Bull. N. P. 284.

1. Counsel and attorneys ought not to be permitted to discover the secrets of their clients, though they offer themselves for that purpose; and this is the privilege of the client, not of the counsel or attorney, for it is contrary to the policy of the law to permit any

any person to betray a secret with which the law has intrusted him.

2. "But the rule now laid down is confined to cases only in which the facts to which the counsel or attorney is called *have been communicated to him in the course of business, in instructing him professionally respecting the cause.*"

For 1st, "A counsel or attorney may be called to prove any fact or matter *which they knew before their retainer*; for as to that matter, they are in the same situation with other persons." Bull. N. P. 284.

2. They may be called to prove *a fact of their own knowledge*, which they might have had knowledge without being counsel or attorney in the cause.

As if the question was concerning a rasure in a deed or will— they may be examined to the question, Whether *they ever witnessed such deed or will in a different plight?* for that is a fact of their own knowledge; but they should not be examined as to any confessions their client may have made to them respecting it. Ld. Say & Sele's case, Mich. 10 Ann. Per Sir O. Bridgman, with advice of all the Judges.

So they may be examined as to the true time of the execution of a deed. Bull. N. P. 284. Ibid.

So where in ejectment brought on an agreement, to which the defendant's attorney was a witness, he was subpoenaed, but refused to give evidence of the execution of it; in consequence of which the plaintiff was nonsuited: the Court granted an attachment against him; for a person attesting any instrument is bound to prove its execution; *nor is such incompatible with his situation as attorney for the opposite party.* Doe v. Andrews, Cowp. 845.

In this case on an indictment for perjury, in an answer in perjury, it was held, That his attorney, who was with the defendant when he took the oath, could not be admitted to prove the identity of the person, and the fact of his taking the oath; but is laid by Lord Mansfield, Cowp. 846. and Bull N. P. 284. to be otherwise: on the ground that such is a collateral matter, and not communicated to him by his client professionally, but a fact which he might know of his own knowledge. Rex v. Watkinson, 2 Stra. 1122.

3. "So neither shall the attorney be obliged to *produce papers*, or such like, which may have been delivered to him by his client; as evidence against him; for such would be equally contrary to the policy of the law."

Therefore on a motion for an attachment against the defendant, for not producing under a subpoena *duces tecum*, certain vouchers which one Peach a client of the defendant's, had produced before master in Chancery; and his subpoena *duces tecum* was for the purpose of founding a prosecution for forgery against Peach; Lord Mansfield and the rest of the Court held clearly, That he was not only not bound to obey the subpoena, but that, on receiving it, he should have delivered the papers over to his client. Rex v. Dixon, 3 Burr. 1687.

"But where any notices or papers have been served on an attorney by the opposite party, in the course of a cause, he may be called and asked as to his receipt of such papers or notices, and if not produced be examined as to their contents."

Therefore where an agreement was necessary to be produced in evidence, and notice to produce it had been served on the defendant's Spencely v. v. Schulemburg, 7 East, 357.

defendant's attorney; but the witness who was called to prove the service of the notice, could only speak to having delivered a certain paper to the attorney, the contents of which he did not know: the production of the paper being required in court, and refused, it was proposed on the part of the plaintiff, to call the defendant's attorney, then in court, as a witness to prove the contents of the paper he had been served with, in order to substantiate the notice to produce the original agreement, and let the plaintiff into evidence of it, if not produced: it was objected to as it came to the attorney's hands, as the attorney for the defendant, and that he therefore was not bound to disclose it. But it was decided that the privilege was restricted to communications oral or written, *coming from the client himself*, and could not extend to adverse proceedings communicated to him by the opposite party, in the course of the cause, and that he might therefore be called for that purpose.

4. "So the facts to which the attorney is bound not to disclose must be *communications made by the client pending the suit*, as instructions to him in the conduct of it; for if matters are disclosed to him *after the end of the suit*, though they respect it, he may be called on to give evidence of these."

Cobden v.
Kendrick,
4 T. Rep. 431.

As where the present defendant had brought an action against the present plaintiff, on a promissory note for 150l., and had obtained an interlocutory judgment, and executed a writ of inquiry, but had compromised it before execution, by taking part of the money from the plaintiff, and his warrant of attorney to confess a judgment for the remainder. Before this became due, *Kendrick* told *Allen* his attorney, that he was glad it was settled, for that he had only given 10l. for the note, and that he knew it was a lottery transaction. This action was therefore now brought to recover back the money paid by *Cobden* on settling the first action, on the ground of want of consideration for the note; and its being known to *Kendrick* when he took it. *Allen* was called as a witness, and objected to; but Lord *Kenyon* admitted him, holding the above distinction as to the mode and time of the communication; and the Court of *K. B.*, on a motion for a new trial, concurred in the distinction.

Duchess of
Kingston's case,
11 State Trials,
243.

This privilege of not being compellable to divulge secrets professionally disclosed to them, is confined to *the attorneys and counsel only*, and does not extend to *persons of other professions*: for where on the trial of the Duchess of *Kingston*, Sir *Cesar Hawkins*, the surgeon, was called to speak to some matters wherein he had been employed as a surgeon by the Duchess, and objected to speak to them, he was ordered by the Court to do it, they holding that he had no such privilege.

Wilson v. Bafall,
4 T. Rep. 753.

So where in an action against the defendant for bribery, at the election for *Newark-upon-Trent*, by himself and his agents, one of whom was one *W. Handley*; *W. Handley* was called and examined as to certain letters received from the defendant respecting the election: these letters were proved to be in the hands of *Mr. B. Handley*, an attorney; he was called, and proved that he had

had received them from a Mrs. Handley, who had them from W. Handley; but W. Handley knew of his having them, and desired him to destroy them. He further proved, that he was not concerned as attorney for W. Handley (nor could he, being under-sheriff) in any cause whatever, neither had he employed any attorney for W. Handley, but that W. Handley had consulted him confidentially in his profession, and had applied to him before and after the receipt of the letters: that he consulted both with W. Handley's attorney by his direction, and with W. Handley himself; and that these letters were communicated to him in consequence of the defendant's consulting him professionally. The Court held clearly, That B. Handley was not privileged as an attorney to withhold the letters as evidence on the trial.

And the attorney or counsel is not only prevented from disclosing any matter communicated to him by his client, where the action is against his client, but cannot give evidence of it in any case whatever; therefore it was agreed in the last case, that had B. Handley been considered as the attorney of W. Handley he could not have given the letters in evidence. *against Rastall*.

Per Buller, Just. in S. C. 4 Term Rep. 760.

6. But an attorney may be called merely to prove his client's hand-writing to a note, or such instrument, as I have seen in practice.

So where to a debt on bond the defendant pleaded usury, and to prove it called the plaintiff's attorney; it was objected to as a tale of confidence; but Lord Kenyon ruled, That it was not within the rule, which extended only to cases of matters communicated by the client, but not where he himself was a party to the original transaction; that did not come to his knowledge by communication from his client, and he was liable to be called to prove it.

Duffin v. Smith, Peake, N. P. C. 108.

2. How far Husband and Wife may be Witnesses.

1. These being one person in the consideration of the law, and their interest absolutely the same, they cannot be witnesses for each other, nor against each other, on account of its being likely to create disputes, and so against the policy of marriage.

Co. Litt. 6. b.

In this case, which was an action by the plaintiff as a feme sole for goods sold, &c.; the defendant called the husband as a witness to prove that she was a married woman; he was admitted at the trial, and the plaintiff nonsuited; but the Court set aside the nonsuit, holding him to be an inadmissible witness.

Bentley v. Cook, Trin. 24 G. 3. quoted 3 Term Rep. 265.

But the wife of an executor who took no beneficial interest under the will, was held to be a good witness to prove the will.

Bettison v. Sir R. Bromley, 12 East, 1250.

2. "And this rule is founded on the policy of the law, not on the ground of interest only."

For where in an action against the sheriff of Monmouth, to recover certain household goods, taken by him under an execution against J. Lewis, on the ground that those goods, under the marriage-settlement of J. Lewis, had been settled to the sole and separate use of J. Lewis's wife; and the action was by the executor of the surviving

Davis v. Dinwoody, 4 T. Rep. 678.

surviving trustee: *J. Lewis* was called as a witness, and was admitted at the trial on the ground *that he came to swear against his own interest*; as by shewing the goods not to be his own, he was prevented from discharging by them the execution against himself: but the Court held, That he was inadmissible, as coming to give evidence on a matter respecting the interest of his wife; and that interest made no part of the question, which was general, that *in no case husbands or wives could be witnesses for or against each other.*

Aveson v. Lord Kinnard,
6 East, 188.

However in this case, which was an action by the husband to recover the amount of a policy of insurance which he had effected on his wife's life, and a surgeon had been examined, who spoke to her state of health when the policy was underwritten, and grounding his opinion on the satisfactory answers given to his questions as to her health, her declaration made at another time to another witness, as to her then state of health, when the policy was underwritten, were held to be evidence.

3. "So in questions tending to criminate the husband, the wife "is an inadmissible witness; and *vice versa*."

Rex v. Cliviger,
2 T. Rep. 263.
Broughton v. Harper,
2 Ld. Raym.
752. S. P.

Therefore where the question was concerning the settlement of a pauper, which settlement was claimed as being the wife of *James Whitehead*; the marriage was proved, but it was insisted on the other side that *J. W.* had a former wife (*Ellen*) living: he denied that he ever was married to *Ellen*; upon which it was proposed to call her: but she was held clearly not to be a competent witness, for her evidence went to criminate her husband, by proving him guilty of bigamy; she therefore was rejected.

Mrs. Rudd's case, Leach,
Crown Caf. 134.

But where on an indictment a woman was called as a witness, she was asked if she did not expect that the conviction of the prisoner would contribute to procure her husband's pardon, who was then under a capital conviction? she said, *she hoped it might*: this it was held went to her credit, not to her competence. This witness was *Mrs. Perreau*, whose husband had been convicted on evidence of *Mrs. Rudd*.

But this rule admits of some exceptions.

Raym. 1.
Contra Brownl.
47. and 2 Hawk.
P. C. 432.

As, 1. In cases of high treason, the wife may be admitted as a witness against her husband, because the tie of allegiance is more obligatory than any other.

Ex parte James,
1 P. Wm. 611.
Field v. Curtis,
Cowp. 829.

2. By stat. 5 G. 2. c. 30. the wife of a bankrupt may be examined as a witness touching his estate; but not as to any thing farther respecting his bankruptcy: nor as to the act of bankruptcy where or how committed.

Bull. N. P. 287.

3. On an indictment on 1 Jac. 2. for marrying a second wife, the first being living, the first wife cannot be a witness, the second may for the second marriage is void.

2 T. Rep. 263.

Nor can the first wife be called to prove that fact on a question respecting a settlement.

Fullwood's case,
Cro. Car. 488.

4. A woman taken away by force and married, may be a witness against the husband, under stat. 3 H. 7. c. 2. against the stealing of women; for a contract obtained by force has no obligation in law.

5. In *cases of personal torts* by the husband against the wife, she may be admitted as a witness against him; and *vice versa*.

In Lord *Audley's* case, the wife was allowed to give evidence against the husband, to prove his assisting in a rape on her. Lord Audley's case, Hutt. 116.

So in an indictment against the husband for an assault on his wife, Lord *Raymond* admitted the wife to be a witness against him on the authority of the last case. Rex v. Azire, 1 Stra. 633.

So the wife is always permitted to swear the peace against her husband: and her affidavit has been permitted to be read on an application to the court of *King's Bench*, for an information against the husband, for an attempt to take her away after articles of separation: and it would be strange to permit her to be a witness to ground a prosecution on, and afterwards not permit her to be a witness on the trial. 2 Hawk. P. C. 432. Lady Lawley's case, Bull. N. P. 237. Rex v. Mary Mead, 1 Burr. 542.

6. "In *actions between other parties*, the wife has been permitted to give evidence to discharge one of the parties, *by charging her husband*."

As in an action for wedding-clothes furnished to the wife, and brought against the husband, the defence was, That they were furnished on the credit of the wife's father; and to prove it, the wife's mother was called and allowed, though it went to charge her husband. Williams v. Johnson, 1 Stra. 504.

"So *her declarations* have been admitted as evidence to charge the husband."

As where it was for nursing the defendant's child, the Chief Justice allowed the declarations of the wife, that she had agreed to pay four shillings a week, as good evidence to charge the husband; such matters being usually transacted by women. Anon. 1 Stra. 527.

"But it seems doubtful if this last case is law, and if the exception should not be confined only to cases where the action is between other parties; for in fact to admit the declarations of the wife to third persons as evidence against the husband, is to admit her testimony against the husband; and so it has been held."

As where in trespass for taking dung: on the cross-examination of a witness, a question was asked, tending to shew that the plaintiff's wife had acknowledged that the dung had been sold by the plaintiff to the defendant; this question was objected to, as it was making the wife evidence against her husband. Just. *Nares* was of that opinion, and rejected the evidence. Kerlake v. Shepherd, Exeter Lent Ass. 1780, MSS.

So in an action for wages earned by the wife of the plaintiff from the defendant's intestate, the Chief Justice would not allow the wife's owning the receipt of 20*l.* to be given in evidence against the husband. Hill v. Hill, adm. 2 Stra. 1092.

Again, where the husband sued *in right of the wife as executor* jointly with her; it was held, That her declarations were inadmissible. Alban & Ux. & al. v. Pritchett, 6 T. Rep. 680.

But in this case, which was trespass by husband and wife forounding the wife, Lord C. J. *Holt* admitted the evidence of what the wife said immediately upon receiving the hurt, as evidence, being part of the *res gesta*. Thompson & Ux. v. Travantion, 1 Skin. 422.

Rex v. Frederick & alt. 2 Stra. So in an indictment against two for an assault, held that the wife of one could not be a witness for the other defendant.
1095. Rex v. Locker, 5 Etp. N. P. Caf. 107, on an Indictment for a Conspiracy, S. P.

Co. Litt. 6. 4.

4. "But no other relation shall exclude persons from being witnesses, though their situation may go somewhat to their credit."

Hill v. Wood, Lent Ass. Maidstone, 1789, MSS.

1. In an action of assault, a woman was called to prove the plaintiff's case: the counsel for the defendant asked her on her *voire dire*, if she was not wife to the plaintiff? she answered, No; she was then asked, if she did not live with him as his wife? This question was objected to, as it could only go to her credit, not to her competence; and therefore could not be asked on a *voire dire*; and it was said, that Lord *Kenyon* had so ruled it at the last sittings: Justice *Gould* was of that opinion, and that she might have refused to answer it; whereupon she was examined in chief: but another witness being afterwards called, the judge ruled, that he might be asked if the former witness and the plaintiff did not live as man and wife?

2. In the case of parents and children it is the same.

Commings v. Mayor and Burgesses of Oakhampton, Sayer, Rep. 45. 1 Will. 332. G. C.

As where in an action for refusing to admit the plaintiff to the freedom of the corporation; at the Trial, the question was, Whether there was a certain custom in the borough to entitle the eldest sons of freemen to their freedom? under this the plaintiff claimed to be admitted, the corporation insisting that it was only by servitude; and whether the plaintiff's father, who had obtained his freedom by servitude, was an admissible witness to prove the custom? *Per Ch. J. Lee.* — Mere relationship, how near soever, does not go to the competency of a witness, unless there be a vested interest in the matter in question; though it may go to the credit of the witness. In the present case, the father had no interest in the matter in question, nor could he at any future time become interested, the freedom of the corporation not being transmissible; it rather made his franchise less valuable, by opening it to others, who might claim as the son did.

How far a father and mother may be admitted to prove the legitimacy of their children, it is settled,

Per Lord Mansfield, Cowp. 592.

That the declarations of a father or mother shall never be admitted to bastardize the issue born after marriage; but they may be witnesses to prove when the issue was born, and to shew whether it was born before or after marriage: so neither shall they be permitted to prove want of access or no connection; for such would be indecent, immoral, and impolitic.

"But they may be in all cases witnesses to prove the legitimacy of their children."

Bull. N. P. 287. Vide ante, chap. of Ejecment.

As in *Pendrel v. Pendrel*, coram *Raymond*, which was an issue out of Chancery, to try whether the plaintiff was heir to *T. O.*; the marriage and birth being admitted by the order, the mother was admitted to prove that the father had access to her.

So in *Loman v. Loman*, the mother was admitted to prove the marriage: and in an ejectment against *Sarah Brodie*, at *Hereford*, 1744, Justice *Wright* admitted the father to prove the daughter legitimate, her title being as heir to her mother.

And in a question of settlement, it was held that either husband or wife might prove the fact of their own marriage. 2 T. Rep. 263.

3. Of Persons inadmissible as Witnesses, on account of Crimes, or being stigmatized by Law.

These are, 1st, On account of conviction for certain crimes to which the law has annexed the punishment of infamy: 2d, On account of religious tenets or principles, which destroys their credit in a court of justice.

1. Of Persons Infamous, on account of Conviction by Law for Crimes.

1. The crimes of this description are treason, felony, and what is denominated *crimen falsi*; as perjury, forgery, or the like: for where a man is convicted of these glaring crimes, his oath is of no weight. Co. Litt. 6.

So if attainted of a false verdict, or of a conspiracy. Ibid.

But outlawry is no disqualification of a witness, for such is punished by loss of property only, not of reputation; and so does not affect their credit as witnesses. Co. Litt. 6.

On a rule for an attachment *nisi*, granted on the affidavit of the defendant, the other party shewed for cause, that the defendant had been convicted of forgery, and stood in the pillory, and produced the record, and an affidavit of the identity of his person. *Per Cur.*—The rule must be discharged; for we cannot suffer the affidavit to be read. So in another case, the affidavit of one convicted of forgery to hold a defendant to bail, was refused to be read. *Vid. postea*, page 228. Walker v. Kearney, 2 Stra. 1148.

So a person convicted of a conspiracy, is an inadmissible witness. Priddle's case, Leach, Cr. Cas. 382.

2. The common punishment that marks the *crimen falsi*, is being set in the pillory; and therefore anciently they held, that no man who had been set in the pillory could legally be a witness; but the rigour of this rule is now abated, and it is now held, Bull. N. P. 292. Co. Litt. 6.6.

That it is the conviction of the crime, not the nature of the punishment, which makes the party infamous; and therefore where the witness had been convicted of barratry and fined, but not sentenced to stand in the pillory, that he was incapacitated from being a witness on account of the infamy of the crime. Rex v. Ford, Salk. 690.

3. So the magnitude of the crime makes no difference; for a person convicted of petty larceny is equally infamous, and as such as inadmissible a witness as one convicted of grand larceny; for both are felony: but it is now enacted, by statute 31 G. 3. c. 36. Mackinder's case, H. 27 & 2. C. B. Bull. N. P. 292.

"That a conviction for petty larceny shall not incapacitate a man from being a witness."

Rex v. Crosby,
2 Salk. 689.

4. If a person be convicted, and have an infamous judgment; as to stand in the pillory, *ex gr.* it is not necessary that *he should have actually stood there*; for it is the judgment to stand there that renders him infamous, not suffering the punishment.

5. "But a general pardon restores the competency of a witness of this description, under the following distinctions:"

Salk. 689.

That where *the disability of being a witness is part of the judgment itself*, there the king's pardon shall not remove it (as in the case of perjury on the statute); for by the statute, it is part of the punishment, that the person be infamous, and lose the credit of testimony; therefore if a person be convicted under the statute, the king's pardon cannot restore him: but where *the disability is a consequence of the judgment*, in such case the king's pardon shall restore the person to his competency of being a witness: as if the indictment is for perjury at common law, in such case the king's pardon shall restore the party, for the *infamy is the consequence, not a part of the punishment*.

2 Salk. 689.
Bull. N. P. 292.

But a pardon by act of parliament will restore in all cases; and a burning in the hand amounts to a statute-pardon.

Gully's case,
Leach, Cru. Cal.
101.

6. And as to how these objections are to be used at Trials, it is settled, That where a witness has been pardoned, and afterwards is called as a witness, and objected to on the ground of his having been convicted, he must produce his pardon *under the great seal*; for letters *under the king's sign manual* are not sufficient, being rather evidence of the king's intention to pardon, than a pardon itself.

2 Salk. 461.

So the party who would avail himself of the incompetency of the witness, on account of a conviction, ought to have a copy of the conviction ready to produce in court.

7. "But it seems that the affidavit of a person so convicted, may be read in the case of the person himself where he is a party."

Davis and Carter's case,
2 Salk. 461.

For where the defendant had been convicted of perjury, and in a subsequent case of a judgment against him, it was moved to set it aside on his affidavit, and it was opposed on the ground that he was convicted of perjury: but *per Holt*—Must he therefore suffer all injustice, and have no way to help himself? and he allowed the affidavit to be read accordingly.

Chaiselworth's case, quoted in Walker v. Kearney,
2 Stra. 1148.

But it can only be read *in defence* of a charge, not in support of a complaint.

Bull. N. P. 286.
Per Denison,
Just. Sayer's Rep. 290.

8. As to how far *particeps criminis* is a good witness, it is settled,

That a *particeps criminis* is a good witness in many cases: as for the plaintiff in trespass, though he is left out on purpose to make him a witness; and a recovery against the defendants in the action is a good bar as to him.

Buth v. Ralling,
Sayer's Rep. 289.
quoted per Lord Mansfield,

Therefore in an information for bribery at an election, brought at on stat. 2 G. 2.; the person bribed, and who had taken the bribery oath, was called as a witness: he was objected to as a *particeps criminis*.

criminis, and on the ground that the tendency of his evidence was to discharge himself, as the statute exempts from the penalty any person discovering another guilty of the offence: but it was held, That a *particeps criminis* was in many cases a good witness, even to obtain a reward or pardon for himself; and besides, that unless a *particeps criminis* was admitted as a witness, the statute would be of no avail, as such transactions are generally matters of secrecy: and Just. Denison cited a case, wherein Ch. J. Byre admitted such a witness. Cowp. 199. Howard v. Shipley, 4 East, 180 S. P.

So where a clerk had embezzled money and notes of his master, which he had laid out with the defendant in illegal insurances in the lottery: on an action brought by the master, he was allowed, on receiving a release, to be a good witness, to prove that the money and notes had been so disposed of by him. Clerk v. Shee & al. Cowp. 197.

In *criminal prosecutions*, according to the opinion of some, a *particeps criminis* can only be a witness in two cases, viz. if he be actually pardoned, or if he has no promise of pardon: but others have holden, that such a promise will be no exception to his competency, but only to his credit; therefore in *Sayer's case*, the Court refused to let a witness be examined on a *voire dire*, whether he had such a promise or not. 2 Hawk. P. C. 434.

2. Of Persons Infamous, on account of their Religious Tenets or Principles.

Persons of this description are rejected, on the ground, that as it is necessary to have recourse to the sanction of an oath, persons denying the being or attributes of the Deity, must consider themselves as not bound by the obligation of an oath, and therefore are not credible.

1. Such is the case of infidels or disbelievers, who are inadmissible as witnesses. Bull. N. P. 202.

Therefore where on an indictment for horse-stealing, a witness was produced, and being examined, he said, That he had heard that there was a God; and believed that those persons who told lies would come to the gallows: but he acknowledged that he had never learned the Catechism, was altogether ignorant of the obligation of an oath, a future state of rewards and punishments, the existence of another world, or what became of wicked people after their death: the Court rejected him as incompetent. White's case, Leach, Cr. Cal. 368.

2. But it is not necessary that a person should profess the *Christian Religion*: Jews are daily admitted, so are persons of other religions; it is sufficient if they profess a religion and belief in the Deity, which will be a tie on them to attest the truth.

Therefore persons of different religions are to be sworn according to the ceremonies of the religion they profess: *Jews* are sworn on the Old Testament. Cowp. 390.

Where a witness was sworn on the New Testament, who admitted that he was born a Jew, but the tenets of which religion he had never formally abjured, and was never baptized or admitted into Rex v. Gilham, Esp. N. P. Cal. 285.

into the Christian church; yet, on his asserting, that he considered himself as a member of the established religion and bound by its precepts, Lord *Kenyon* held him to be an admissible witness, though he had taken the oath in manner mentioned.

2 *Stra.* 1004.
At the Council,
present the two
Chief Justices.

So on a complaint made by *Jacob Fachina* against General *Sabine*, as governor of *Gibraltar*, *Alderaman Ben Monso*, a *Meor*, was produced as a witness, and sworn upon the *Koran*, without any objection.

Omichund v.
Barkar,
1 *Atk.* 21.

So in this case a *Gentoo* was sworn as a witness according to the ceremonies of his religion, and admitted.

Bull. N. P. 292.
3 *Black. Com.*
101.

3. *Persons excommunicated* cannot be witnesses; for being excluded from the church, they are supposed to be under the influence of no religion.

By stat. 3 *Jac.* 1. c. 5. it is declared, "That *Popish recusants convicted* shall stand to all intents and purposes disabled, as a "person lawfully excommunicated:" upon which it has been contested, that these shall also be excluded as witnesses: but Serjeant *Hawkins*, *P. C.* vol. 1. fol. 23, 24., contends, that is too severe a construction of the statute, which should only extend to a disability to bring actions.

4. Of Persons inadmissible as Witnesses, from want of Discretion.

Bull. N. P. 239. Of this class are persons *non compos*, idiots, madmen, and children whose age incapacitates them from discriminating between right and wrong.

Ibid.

With regard to children, there seems to be no time fixed wherein they are excluded from giving evidence: but it will depend in great measure on the sense and understanding of the child, as it shall appear on examination in court.

Brasier's case,
12 *Apr.* 1779.
Bull. N. P. 293.

On an indictment for assaulting an infant of five years old, with an intent to commit a rape; it was held, That the child might be admitted as an evidence, if she appeared to have any notion of the obligation of an oath; and it was agreed by all the Judges, that a child of any age, capable of distinguishing between good and evil, might be examined upon oath; and that, therefore, evidence of what she had said ought to be received.

But, however, this point seems formerly to have been otherwise ruled by very high authorities.

Rex v. Travers,
1 *Stra.* 700.
Kingston Lent
Ass. 1736.
Hale's P. C.
Not admissible
under 10 years
old.

The defendant was indicted for a rape on a child of six years old, and Lord Chief Baron *Gilbert* refused to admit the child as an evidence: so he was acquitted. But at the same assizes he was indicted for an assault, with an intent to commit a rape: and it coming on to be tried at the next assizes, before Lord *Roymond*, the child was produced as a witness; and it was attempted to distinguish the cases, that this was a misdemeanor, and the other a felony: but the Chief Justice held, That there was no distinction between capital and lesser offences in this respect: for that children of so early an age were never admissible; and cited cases from the *Old Bailey*, where it had so been ruled.

2. HOW PAROL EVIDENCE IS TO BE GIVEN.

1. Every witness before he is examined must be *sworn* according to the ceremonies of his religion, or if a Quaker, he must *affirm*.

1. "But a witness may be examined as to his religious opinions; and if found to be an infidel or atheist, he may be rejected, that being a conclusive objection." (*Ante*, fol. 229.)

In a cause at *Westminster* before Lord *Kenyon*, a witness was produced: after being sworn, he was asked, "If he believed in the holy gospels of God?" After some prevarication, he answered that he believed in them as far as he understood them: he was admitted as a witness.

Anon. Sitt. after Hil. 1791.

It was formerly the law, that in criminal cases the witnesses for the prisoner were not sworn; but it is now ordered by stat. 1 *Ann.* 9. That they shall be sworn in like manner as the witnesses for the crown; and perjury is in like manner assignable, if they swear falsely.

2. "In the case of Quakers a particular exception is allowed by stat. 7 & 8 *W.* 3. c. 34., which allows a Quaker's affirmation to be admitted in all cases where the oath is required from others, except in criminal cases."

3 Inst. 79.

Upon which statute it has been decided,

In an appeal of murder a Quaker is not admissible as a witness; for it is a criminal proceeding, though the king is not the prosecutor.

Castel v. Barnbridge & al.
2 Stra. 854.

On a motion for an attachment for non-performance of an award, it having been moved on the affirmation of a Quaker, the Court held that they could not grant it, for though in a suit between party and party, it was a criminal proceeding within the statute 7 & 8 *W.* 3.

Robins v. Sayward,
1 Stra. 442.

On a motion for an information for a misdemeanor, the Court denied it, it being moved on a Quaker's affirmation.

Rex v. Wych,
2 Stra. 872.

So a Quaker cannot exhibit articles of the peace without oath.

Rex v. Green,
1 Stra. 527.

So a rule to answer the matters of an affidavit made on a Quaker's affirmation cannot be supported,

Oliver v. Lawrence,
2 Stra. 946.

On shewing cause against an information for a misdemeanor, a Quaker's affirmation was offered, the Court held, That a Quaker's affirmation could not be read in support of a criminal charge, though it might be read in defence of a criminal charge in his own defence where the person charged the Quaker; but that where it is in defence of another, where the Quaker is not himself charged, there it cannot be read.

Rex v. Gardiner,
2 Burr 1117.

So in an action of debt, on stat. 2 *G.* 2. c. 24. for bribery at an election, evidence on the affirmation of a Quaker is good and admissible; for it is not a criminal proceeding within the statute.

Archibon v. Everett,
Cowp. 382.

So a rule to shew cause why an appointment of overseers should not be quashed, was made absolute on the affirmation of a Quaker; for it is not a criminal prosecution, though on the crown side, and intitled in the king's name.

Rex v. Turner,
2 Stra. 1219.

2. As to the *manner of swearing*—Persons of the established religion should swear in the usual form; but different sects are allowed to swear in the form usual with them; as *Jews* on the Old Testament, and with their hats on; so *Turks* on the *Koran*.

“So sectaries in *England* have been admitted to swear according to their own rites.”

Per Lord Mansfield, Cowp. 39c.
2 Sid. 6.
In the year 1657, Dr. Owen, Vice-Chancellor of *Oxford*, being called on as witness, refused to kiss the book; but desired that it might be opened before him; and he lifted up his right hand: The Jury prayed the opinion of the Court if they ought to pay the same credit to him as to a witness sworn in the usual manner; and Ch. J. Glynn told them he considered the oath as strong as that taken by any other witness.

Per Lord Mansfield, Cowp. 39c.
There is a sect in *Scotland* who hold it to be idolatry to kiss the book at this day; but their form of swearing is much more solemn. At *Carlisle*, in the year 1745, on the prosecution of some of the rebels, there was no evidence but from persons of this sect, who would not kiss the book; a case was sent up to *London* for advice, if they should be received as witnesses? and it was agreed, That their evidence in that form was good.

3. As to what questions may be asked a witness.
It is a general rule, That a witness cannot be asked any question, the answering of which may oblige him to accuse himself of a crime, or subject him to penalties or punishment. *Ante*, *Hill v. Wood*, fol. 225.

Rex v. Edwards, 4 T. Rep. 440.
But where an application was made to the Court to bail the defendant, who was charged with grand larceny; one of the bail was asked, *If he had ever stood in the pillory?* This question was objected to, as tending to criminate him: but the Court overruled the objection, as the answer could not subject him to any punishment. He refused to answer the question, and was rejected.

“The party in this case having come up as bail to speak to his own sufficiency, may have been the reason of the Court allowing the question to be asked. For it seems to be a matter not quite settled, how far a witness may be asked a question, the tendency of which would be to degrade or disgrace him.”

Rex v. Lewis, 4 Esp. N. P. Cas. 225.
In this case, where the question asked of the witness was, “Whether he had not been in the house of correction in *Suffex*,” Lord *Ekenborough* ruled, that the question should not be asked, adding, that it had been before so settled by Chief Justice *Treby*, and Mr. Justice *Powell*, who were both very great lawyers.

Macbride v. Macbride, 4 Esp. N. P. C. 242.
In the same term a similar question arose in the Common Pleas. The question put to the witness was, “Whether she did not live as a kept mistress with the plaintiff?” Lord *Alvanley* said, he would not lay it down as a general rule, that no question could be asked, the tendency of which was to degrade or disgrace the witness. He thought that such only should not be put which had a direct and immediate effect to disgrace the witness; but he would allow questions as to general conduct. He therefore said, the

he witness should be asked if she was a married woman? but having said she was not, he would not permit the further question to be asked, "Whether she slept with the plaintiff?"

But although a witness may be asked a question, the tendency of which may be to discredit himself, yet if such question is collateral to the issue, and the witness by his answer disclaims it, it is conclusive, and witnesses cannot be called to disprove the answer of witness.

Harris v. Tip-
pett,
2 Campb. 637.

Where however a person going out in one of the company's ships bound himself by covenant to answer any bill of discovery filed against him, and not to plead the acts of parliament subjecting him to penalties and forfeitures in bar of the bill, it was decided, That to a bill filed he must answer in pursuance of the covenant, even though the discovery might subject him to penalties.

East India Com-
pany v. Atkins,
1 Stra. 168.

"The rule of law allowing to a witness the privilege of refusing to answer a question tending to criminate himself still remains, but it being doubtful, whether, where the question did not tend to criminate the witness, but the answer to it might tend to establish a debt against him, or subject him to a civil suit, he was bound to answer, it was enacted by stat. 46 Geo. 3. c. 37. That a witness could not by law refuse to answer a question relevant to the matter in issue, the answering of which had no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatever, by reason only or on the sole ground, that the answering such question might establish that he owed a debt, or otherwise subject him to a civil suit."

Upon this stat. it has been held, That on an appeal respecting the settlement of a pauper, a rated inhabitant cannot be compelled to be a witness.

Rex v. Wo-
burn,
10 East, 395.

4. How far a witness shall be permitted to use memorandums to refresh his memory, it is settled,

"That where a witness will swear to a fact from recollection, he may use a minute or memorandum to refresh his memory: But where he will only swear to a fact from finding it in a minute or memorandum, in such case he shall not be allowed to use such a memorandum; but the original minute must be produced."

In ejectment for several premises at Wendover in Buckinghamshire, the question turned on the times when the several holdings expired: to prove these times a Mr. Aldridge was called as a witness: in giving his testimony he produced a minute, in which was written the times when the several tenancies commenced: being examined concerning it, he said, That some years before he had accompanied Newton, the receiver of the estate, round to the different tenants, and examined them as to their holdings, and minuted down in a book their several declarations as to the time when their holdings commenced; that some of the entries were made in the book by Aldridge himself, and others by Newton; that the minute from which he then gave his evidence was extracted from the book, but that the book itself was not in court. On his cross-examination he admitted, That he had no memory of his own

Doe ex dem.
Church v.
Perkins,
3 T. Rep. 749.
Tanner v. Taylor,
Ante, 142. S. P.

as

as to the specific facts, but that the evidence he was giving was founded altogether on the extracts he had made from the book: it was held clearly, That the witness should not have been allowed to give his testimony under those circumstances; and Lord Kenyon cited the following case:—

Mich. Vac. 1753,
Lincoln's Inn
Hall.

Mr. Noel moved to suppress depositions on a certificate from the commissioners, that the witness, whose depositions they were, refreshed her memory during the examination, from minutes consisting of six sheets of paper, of her own hand-writing, the substance of which she declared she had set down as the facts occurred to her memory; that five of the six sheets were in the form of a deposition, which she declared had been done for her by the attorney for the plaintiff, whom she had requested to digest her notes, and reduce them to order, and that after that she transcribed them, and altered them where it was necessary to make them consistent with her meaning: that the six sheets then produced were entirely her own writing, unassisted by any one, and these she had frequent recourse to during her examination. The Lord Chancellor animadverted with some severity on the practice of so allowing the attorney to draw up the depositions a witness was to use, and suppressed the depositions.

In the last case the Chancellor said — In some cases a man may use papers at law; but I have known some judges (and I think I adhered chiefly to that rule myself) to let them use papers only drawn up as the facts happened.

Duchess of
Kingston's case,
11 St. Tr. 255.

Burrough v.
Martin,
3 Campb. 112.

But in this case Mr. Le Roche was permitted to refresh his memory by a copy from his own memorandum, which copy had been taken by another, but under his own directions.

But the entries need not be in his own hand, for a witness may refresh his memory by entries in a book, which he did not write, but regularly examined after they were written, and while the facts were fresh in his recollection.

5. As to how it is to be given to the jury—it must be done in open court.

Metcalf v.
Dean,
Cro. Elis. 189.

For where the jury having withdrawn to consider of their verdict, one of the witnesses who had before been sworn for the defendant was called before them, and they re-examined him, and then they gave a verdict for the defendant: complaint being made of this to the judge of assize, he questioned them concerning it, which they owned, but that the evidence was the same in effect as that given before, *et non alia nec diversa*. This matter being returned on the *postea*, the Court were of opinion, That the verdict was not good, and ordered a *venire facias de novo*.

“ The form of proceeding at *nisi prius* being by *viva voce* testimony and not by depositions, the latter are never admissible
“ where *viva voce* testimony is to be had. It is however often
“ admitted under the circumstances of mutual consent, or as terms
“ imposed by the Court. As where a party applies to put off
“ a trial, and the other party's witnesses are going abroad, the
“ Court will make it part of the terms of granting the application,
“ that

that the party consent to examine the witnesses on interrogatories to be read at the trial.

“ Before however they are so read, evidence must be given that the person whose depositions are about to be read is absent from the kingdom, as in case of his being in the kingdom, he should be examined *viva voce*.”

It should seem, however, that where a witness had sailed on a voyage, but was put back, and it was not known whether he was in the kingdom or not when the cause was tried, his deposition might be read. Ward v. Wells,
1 Taunt. 462.

But evidence that the witness was a seafaring man, and seen on board a ship in the *Thames*, without shewing how the ship was bound or about to sail, and no recent inquiries after the witness being proved, Lord *Ellenborough* ruled the depositions to be inadmissible. Falconer v.
Hanson,
1 Campb. 172.

6. When a witness has been examined in a cause and is dead, what he swore in that cause may be proved by a witness who heard him, as evidence in another cause. Per Lord Ellen-
borough, Strutt
v. Bovingden,
Esp. N. P. Caf.
56.

The question in both cases however was as to the same right, right of water, in the river *Colons*.

And note, That a witness, after he has been examined in chief, and cross-examined, cannot regularly be objected to for incompetence. Per Lord Mans-
field,
4 Burr. 2252.

Vide contra, per Lord *Kenyon*, *Stone v. Blackburn*, *Esplin. Caf.* N. P. 37.

But a witness excepted to by one party, and set aside, may be afterwards called by that party, and examined on his side. Atwood v. Dent,
1 Stra. 480.

2. OF WRITTEN EVIDENCE.

Written evidence is either public or private.

Public is, 1st, Records properly so-called; that is, memorials of the legislature, and of the king's courts of justice, which are matters of the highest authority: 2d, Public matters not of record: 3d, Private, as written documents belonging to individuals; as deeds, notes, &c., which derive their credit from the proof of their execution, by the party against whom they are produced.

1. OF RECORDS.

Records are of two sorts: 1. Acts of parliament; 2. Proceedings or Records of courts of Record. — In treating of which I shall consider,

1. The nature of each; 2. How they are to be given in evidence.

1. Of Acts of Parliament,

1. Acts of parliament are either public or private; and they differ in the following respects: —

What-

4 Co. 76.

Whatever concerns the kingdom in general is a general law; but whatever concerns only a particular class of men, or some individuals, is a particular law; the first is the object of general or public acts of parliament; the latter of private acts.

Bull. N. P. 223.

1. Therefore a law which concerns the *king* is a general law; for he is the head and union of the commonwealth.

Ibid.

2. So a law that concerns *all lords* is a general law, because it concerns all the property in the kingdom; it being all held under lords mediate or immediate.

Ibid.

But a law which concerns only *the nobility or lords spiritual*, is only a particular law, because it relates to one set of persons; as for example, a law making them liable to certain process.

Ibid.

But, perhaps, a law respecting the *whole body of the peerage* would be deemed a general law; for as such they are part of the legislature, and what relates to the constitution is a general law.

Ibid.

3. What relates to *all officers* in general is a general law, because it concerns the universal administration of justice, as *ex gr.* "That no sheriff or other officer shall take a reward for executing his office;" but if it relates to *particular officers*, and not to the administration of justice, it is a particular law.

Ibid.

4. What relates to *all spiritual persons* is a general law, inasmuch as the religion of the kingdom is of general concern to the whole kingdom; as the several statutes of 21 Hen. 8. 13 Eliz. 10. and 8 Eliz. 11. concerning the leases of ecclesiastical persons: but the stat. 11 Eliz. of *Bishops' Leases*, is a particular law, as it respects only one set of spiritual persons.

Ibid.

5. An act that relates to and comprehends *all trades* is a general law, and because it relates to traffic in general; but an act respecting butchers or bakers only, is a particular law.

Bull. N. P. 223.

6. If the matter of a law be ever so special, if it *relates equally to all*, it is a general law; but a law *relating to some particular county or parish*, is a particular law.

Saxby v. Kirkus,
Bayer, Rep. 116.

7. A private law may become a public one, by being recognized in such public one; as the stat. 23 H. 6. c. 10., of sheriffs' bonds, is a private law; but being recognized in stat. 4 & 5 Ann. c. 16., which enables sheriffs to assign it, it becomes a public one.

Bull. N. P. 222.

8. So a law may be both general and particular in different parts, as *ex gr.* 3 Jac. 1. *against recusants, in disabling them to present*, which is general: but the clause giving their presentations to the universities is a particular law.

2. Public and private acts again differ in the manner the Courts take notice of them.

Bull. N. P. 222.

1. A general act of parliament is taken notice of by the judges and jury, without being shewn to them: but a *particular act is not taken notice of unless it is shewn*: for the Court cannot judge of particular laws which do not concern the whole kingdom, unless that law be exhibited to the Court; for they are obliged to judge *secundum leges & consuetudinem Angliæ*; and therefore a particular law

not

ot being *lex Angliæ*, as not relating to the whole kingdom, they are not *ex officio* obliged to take notice of it, unless, like other matters, it is brought before them.

2. But a private act of parliament, or any other private record, may be brought before the jury and given in evidence if it relates to the issues in question, though it be not pleaded: for the jury are to find the truth of the fact in question, according to the evidence brought before them. And if therefore the private act do evince the truth of the matter in question, it is as proper evidence to the jury as any record or other evidence whatever; perhaps the most proper sort of evidence. Hob. 272.
Cro. Jac. 112.

But, however, such is not in all cases admissible, for there are cases in which both public and private statutes ought to be pleaded, and that is, where they make void any legal solemnities: and the reason why they must be pleaded is this; that as solemn contracts are not deemed nullities, but voidable by the parties prejudiced, as *quisquis renunciare potest jure pro se introducto*, perhaps the party might wish to waive the benefit of the statute; but to construe them nullities would be to lay the rule aside, and the party must receive benefit from the law whether he would or not; and therefore it is required that he shall plead such statute, to shew that the party takes the benefit of it. Bull. N. P. 224.

Another reason for this is, that as it is matter of law what solemnities are necessary to a contract, it must, in like manner, be matter of law how they are to be defeated. As therefore, where the action is founded on a contract, it must be shewn to the Court; so it must, in like manner, be shewn to the Court where it is to be defeated. Therefore the stat. of *Eliz.* touching usurious contracts, cannot be given in evidence, though a general law, but it ought to be pleaded. So a fine is declared to be void by the statute of *Westminster*, 2. 1. but is held only to be voidable; so a recovery by a wife with a second husband is declared to be void by statute 11 *H.* 8. but is construed only to be voidable. In all these cases, therefore, the statutes must be pleaded. Bull. N. P. 224.
4 Co. 117.
Hob. 72.
2 Inst. 336.
4 Co. 59.

So in an action or information on a penal statute, if there is another statute that exempts or discharges the defendant from the penalty, he must plead it, and cannot give it in evidence on the general issue; for the general issue is only a denial of the declaration, and the plaintiff has proved the defendant guilty when he has proved him within the law upon which his declaration is founded: but if the defendant would exempt himself from the charge, he should not have denied the declaration, but have shewn the law that discharges him. Bull. N. P. 225.

Tamen quære, If this be law? for on a motion to quash an indictment on a penal statute, 5 *Eliz.* for exercising the trade of a tanner, on the ground that there is another stat., 1 *Jac.* 1. c. 22., which exempts tanners from prosecution in several cases, it was objected, That the indictment should state the defendant was not within any of these exemptions; as in convictions in the game-laws all exemptions are to be expressly negatived: but the Court held, That exceptions of this sort are to be taken advantage Rex v. Pemberton,
1 Bl. Rep. 230.

tage of in evidence, on not guilty; and so refused to quash the indictment.

Rex v. Hall,
1 T. Rep. 322.

In this case it is said *per Cur.*—If a subsequent statute contains an exception to a former one, it is incumbent on the defendant to shew, by way of defence, that he comes within such exception.

3. Another case of giving statutes in evidence is, where there is a proviso.

Bull. N. P. 225.
Godb. 145.

If the *proviso* is *matter of fact*, it may be given in evidence under the general issue: as if an action of debt is brought against a spiritual person for taking a farm, and the defendant pleads *quod non habuit nec tenuit firmam contra formam statuti*, the defendant may give in evidence under that issue, *that it was for the maintenance of his house*, according to the proviso of the statute which allows it. But on an information under 5 Ed. 6. c. 14. for ingrossing, the defendant cannot, on the general issue, give in evidence *a licence of three justices* within a proviso of that statute; because, whether there was sufficient authority or no, is matter of law, and therefore must be pleaded.

Rex v. Bryan,
2 Stra. 1101.

Rex v. Pen,
Jones. 320.
2 Roll Abr. 68.
Godb. 144.

But a saving proviso may be given in evidence on the general issue, because, if the party be within the proviso he is not guilty within the body of the act on which the action is founded.

Per Lord Mansfield,
2 BL Rep. 95.

4. The *title of a statute* is no part of the law, nor shall its construction control the body of the act; for it does not pass with the same solemnity as the statute itself; one reading of it is often sufficient.

I. OF PROCEEDINGS IN COURTS OF RECORD.

Proceedings in courts of record, which are the second species of public evidence, are, 1st, Fines and Recoveries: 2d, Verdicts: 3d, Judgments: 4th, Writs: 5th, Affidavits.

1. Of Fines and Recoveries.

These are matters of record, and conclusive evidence.

Green v. Proude,
1 Mod. 117.
1 Vent. 257.
S. C.
Bull. N. P. 230.

But, as a *præcipe* does not lie against a person that is not seised of the freehold, therefore when you shew a recovery, *you must prove seisin in the tenant to the præcipe*: however, in an *ancient recovery seisin will be presumed*; especially where possession has gone agreeable to it since; for that fortifies the presumption that every thing was rightly transacted: but, in a modern recovery, the *seisin* must be proved; because, from the recency of the fact, it is easily done; and presumption in such case is not equally fortified by subsequent possession.

Keen ex dim.
Earl of Portsmouth v. Earl of Eppingham,
2 Stra. 1267.

But though in the cases of old recoveries, the Court will presume that there were proper tenants to the *præcipe* where no deed appears; yet, where deeds appeared inrolled for that purpose, wherein proper parties had not joined, and the uses were declared to be warranted by such deeds, the Court would not presume that there were any other. *Vid. Plen. ch. Ejectment, ante.*

2. Of Verdicts.

1. As to verdicts, it is a general rule, That no verdict shall be given in evidence, but between such as were parties in the cause in which the verdict was given, or privies to them.

Per Pratt, Just.
1 Stra. 68.
1 Raym. 730.

Therefore, a verdict on an indictment cannot be read on an action for the same cause; as an assault, *ex gr.*—for the one is at the suit of the king, the other at the suit of the party.

Per Pratt, Just.
1 Stra. 68.
1 Raym. 730.

However, in this case, which was an issue out of Chancery, *devisavit vel non*, on which it was insisted, That the testator was *non compos* on the 29th, having shot himself the 31st; the Court were divided, Whether the verdict of the coroner's inquest, which found him a lunatic, was admissible evidence, or not.

Jones v. White,
1 Stra. 68.

So in this case, where goods had been taken in execution, and the plaintiff advanced the money to the officer, and paid off the execution, but did not then take an assignment or bill of sale of the goods; another execution afterwards came into the house, under which the same goods were taken; and being claimed by the plaintiff under the first transaction as a sale to him, the sheriff impanelled a jury, as an *inquisition* to try the right of property, and they found it to be in the plaintiff: notwithstanding which, the plaintiff in the second execution indemnified the sheriff, who levied on the second execution, and paid the money over to him, and the plaintiff brought trover against the sheriff:—It was adjudged, That the *inquisition* so taken by the sheriff's jury was not admissible evidence to prove property in the plaintiff, it not being under the king's writ.

Latkow v. Sheriff of Middlesex,
H. Black. 437.

“However, the above rule seems to be correct, and the reason for it is, That it is the privilege of the party to cross-examine the witnesses; of which, by this means, he would be deprived.”

Therefore, a verdict on the same point, and between the same parties, may be given in evidence, though, the lands are not the same: for in that case, the parties have had the liberty of cross-examination; and nothing can be more opposite to natural justice than that a man should be bound by a decision which he had not an opportunity of opposing and controverting. But it can be no objection to the evidence that the lands are different: for the object of dispute makes no difference as to the right.

Sherwin v. Clarges, 1700,
Bull. N. P. 232.

Therefore, in a trial between *A.*, lessee of *B.* and *E.*, and *C.*, lessee of *E.* and *B.*, in which the parties have only changed places from plaintiff to defendant, either party may give the former verdict in evidence, for there each party have had the benefit of cross-examination; and the Court will take notice, that in ejectment the lessor is the real plaintiff, and the lessee or nominal plaintiff, a fictitious person.

Bull. N. P. 232.

Another reason why verdicts are only admitted in evidence between the same parties, is this: That as a stranger should not be

Lock v. Norborne,

3 Mod. 141.
Hard. 472.
Caf. K. B. 319.

be prejudiced by a verdict in a cause to which he was not a party, he therefore shall not have any benefit from it; for no record, or conviction, or verdict, shall be given in evidence, but such whereof the benefit may be mutual, viz. such whereof the defendant; as well as the plaintiff, might have made use, and given it in evidence in case it made for him: therefore a verdict on an indictment is not evidence in an action for the same cause; for as no person can be a witness in his own cause in an action, though he may be on an indictment, to allow a conviction on an indictment to be evidence, would be to admit the party's own evidence; which should not be.

Gibson v. Mac-
Carty,
Caf. temp.
Hardwicke, 311.

"But a verdict may be given in evidence in case of *privies*, under the following distinction:"

Per Glyn,
Hard. 426.

If there be several remainders limited by the same deed; a verdict for one in remainder shall be given in evidence for another in remainder; but if there be a recovery against a tenant for life, this is no evidence against the reversioner: for the tenant for life is seised in his own right, and that possession is properly his own, and he is at liberty to pray in aid the reversioner or not; and the reversioner cannot possibly contest the matter where no aid is prayed: but, as if he comes in on the aid prayer, he may have an attain, consequently the verdict can be evidence against him.

Yelv. 32.

Bull, N. P. 232.

Hob. 53.

But where it is said that a verdict may be given in evidence between the same parties, it is to be understood with this restriction, *that it is of a matter which was in issue in the former cause*; for otherwise it will not be allowed in evidence, because if such verdict be false there is no redress, nor is the jury liable to an attain.

Sintzenick
v. Lucas,
Esp. N. P. Caf.
44.

As where in a case for unskilfully varnishing certain prints, the property of the plaintiff, whereby they were spoiled, it appeared that an action had been brought by the present defendant against the present plaintiff, for work and labour in varnishing those prints, in which the present defendant had a verdict; and it was contended, that as the plaintiff might have defended himself in that action, by shewing that the prints had been spoiled, the verdict in that action must be held to be conclusive evidence in bar of this; but it was ruled by Lord *Kenyon*, that in order to make a record of a verdict evidence to conclude any matter, it should appear that that matter was in issue; which should appear from the record itself; *nor should evidence be admitted to prove that under such record any particular matter came in question*, for that would be to try the cause over again.

But to the rule now laid down, are the following exceptions:

City of London
v. Clerke,
Carth. 181.

2. "In the case of tolls and customs."

For the custom or toll is the *lex loci*: and facts tending to prove that, may be given in evidence by any person, as well those who have been parties to such suit or to such verdicts as have found and determined them: and in such case it is not material whether such verdict be recent or ancient.

2. "Whether *parcel or not of a manor*, old inquisitions are admissible evidence."

In this case a commission under the great seal of the Exchequer, 13 Eliz. Rot. 290. in Scac. directed to five commissioners, who were to inquire by the verdict of a jury, if the prior of t. Swithin of Winton was seised of lands, called *Woodcrofts*, as parcel of the manor of Hinton Daubeny; and whether king Hen. 8. dw. 6. &c. were seised of it, &c. on which was a return by verdict, "That the prior was seised of it as parcel of that manor," &c. This was admitted as good, but not conclusive evidence of the facts contained in it; though the defendants in this cause were parties to the inquisition.

Tooker v. D. of Beaufort,
1 Burr. 146.

So in this case it was agreed by the Court, that an *inquisitio post mortem* was good evidence.

Jones v. White,
1 Stra. 68.

"And it is evidence, though there has been a mis-trial of the inquisition."

For where on a trial at bar, the defendant made title under an indentail; and among other things offered in evidence an *inquisitio post mortem*, 25 H. 8. whereby it was found that the deceased tenant was seised in fee, and upon a traverse it went down into *Salop*, where it was found that the tenant was only seised in tail, on which judgment and an *amoveas manus* issued; it was objected that this was a mis-trial; for that the lands lay in *Wales*, and that the trial here was in *Shropshire*, it being before stat. 27 Hen. 8. c. 26. which united *England* to *Wales*, and so was *coram non judice*: but the Court ordered it to be read, saying it was not void, but voidable.

Leighton v. Leighton,
1 Stra. 308.

3. "A third case is that of commoners."

If an issue has been tried in an action by a commoner, on right of common, upon a custom extending over the whole manor, verdict on that issue would be evidence in another action, by other commoner, respecting the same right of common: *aliter*, where the common is claimed as belonging to a particular estate.

Per Buller, Just.
1 T. Rep. 302.
Ante.

4. "Where the custom of a manor is to be proved, that is, such as regulates the course of descents of lands, forfeitures, &c., that is usually done by the steward of the manor from the court rolls, and by evidence from him or others of the usage corresponding with the custom."

In this case however, which was an ejectment by the heir in remainder to recover customary lands held of a manor by a widow *ante casta viduitate*, on the ground of her having committed a forfeiture by incontinence and having a child: it was held, that an avowry of the custom so to hold the lands, on the rolls of the court and admission in that form, was sufficient evidence of the custom, though there was no evidence of its ever having been acted on, or even to have ever been enforced. For *per* Ld. Ellenborough:—might have happened that from fear of the forfeiture or from the use of moral obligation, no such instances of forfeiture had occurred, so that the custom would then come to be decided by evidence of the forms of admission only.

Doe ex dem. Askew v. Askew,
10 East, 520.

EVIDENCE.

5. "In cases of pedigree principally, in which *bearsay and reputation are evidence*, there a verdict, though not between the same parties, is evidence."

Bull. N. P. 233.

As in such case a *special verdict between other parties stating a pedigree*, would be evidence to prove a descent; for in such case, what any of the family have been heard to say, general reputation in the family, entries in family-books, monumental inscriptions, recitals in deeds, are allowed.

Neal ex dim.
Duke of Athol
v. Wilding,
2 Stra. 1151.
Bull. N. P. 233.

However, in this case, where a special verdict was offered in evidence of a pedigree, *Wright*, Just. was for admitting it, but the rest of the Court refused it: But it is said by Just. *Buller*, that Just. *Wright's* opinion is now generally taken as the law.

Per Holt, G.
Hall, 14 W. 3.
Bull. N. P. 243.

6. A verdict, with the evidence, given in an action, brought by a carrier, for goods delivered to him to be carried, shall be given in evidence, in an action by the owner for the same goods, against the carrier: for it is strong proof that he had the plaintiff's goods; and if the witness is dead or not to be found, it is the best evidence; for it amounts to a confession in a court of record.

Reed v. Jackson,
1 East. 355.

7. So a verdict as to a right of public way, is evidence between other parties.

Strutt v. Bovingdon,
5 Esp. N. P. C. 56.

8. So where a question respecting a *right of water* had been tried in an action on the case, it was ruled by Lord *Ellenborough* at *Hertford* that a record of the verdict in that trial, was evidence in a second action against the same defendant, though there were other defendants in the new action.

3. Of Judgments.

Judgments come nearly under the same rule as verdicts; for regularly, no judgment is admissible evidence, but against parties or privies.

But there are some exceptions:

Rex v. Heyden,
2 Stra. 1109.

1. As on an information, in nature of a *quo warranto*, against the defendant as bailiff of *Scarborough*; he made title as elected under the bailiffship of *Batty* and *Armstrong*; and upon issue joined, whether they were bailiffs or not? a record of judgment of *oustin* against them was read in evidence. On a motion for a new trial, it was held to have been properly admitted.

Rex v. Mayor
of York,
5 T. Rep. 66.

2. A judgment of ouster against a corporator is conclusive evidence against another who derives title under him.

Cooke v.
Shollam,
5 T. Rep. 255.

3. A judgment of condemnation *in rem* in the Exchequer is conclusive evidence of the legality of the service.—*Qu. sed*, if the acquittal is conclusive evidence of the illegality of the seizure, in an action against the serving officer.

4. Of Writs.

Writs are to be given in evidence differently where they are only inducement, and where they are the gift of the action.

4.

1. Where

1. Where a writ is only inducement to the action, the taking out the writ may be proved without any copy of it; because, possibly, it might not be returned, and then it is no record: but where the writ is the gift of the action, there must be produced a copy from the record; for it does not become the gift of the action till it is returned; and it is necessary to have the best evidence the nature of the thing is capable of. *Vid. ante*, ch. *Trespass*. Bull. N.P. 234.

And where the writ is the gift of the action, and is not returned, so that the party could not give an office copy in evidence. As in this case, when it was necessary to prove that a writ had been issued to support an averment to that effect, it was held that it was not sufficient to prove the *precipe* by the filacer's book, and notice to the opposite party, who sued it out, to produce it. The party should go further, and prove that he searched at the Treasury to find if it had been returned, and that no such writ was found there, and so that it must be in the party's hands. Edmonstone v. Plaisted, 4 Esp. N. P. Cal. 160.

2. So the sheriff's return on the writ is *prima facie* evidence of the facts stated in it, as where the sheriff returned specially that he had kept the goods taken under the first writ of *fi. fa.* and kept them unfold at the request of the plaintiffs and defendants. Gyfford v. Woodgate, 11 East. 297.

3. To prove the issuing of a writ it is not sufficient to produce the *precipe* and give notice, the Treasury should be searched, and no such writ be found. Edmonstone v. Plaisted, 5 Esp. N. P. Ca. 160.

5. Of Affidavits.

1. "Affidavits must be regularly intitled; in order to make them evidence, and the christian as well as surname be mentioned."

Therefore, where affidavits were produced without any *title of the cause*, the Court would not allow them to be read; though the counsel on the other side were willing to waive the objection. Per Ld. Kenyon, 2 T. Rep. 644.

So if they are mis-intituled, as in mistaking the Christian name of any of the parties. Nix v. Jowatt, Hil. 31 G. 3. MSS.

But where the application is to make a *submission to an arbitration a rule of Court*, under the statute, where there has been no action, the affidavits upon which one of the parties applies for an attachment for non-performance of the award, need not be intitled in any cause; for there is then no action; but the affidavits in answer to the application must be intitled. Bevan v. Bevan, 3 T. Rep. 601.

So on a rule for an information being moved, the affidavits were intitled in no cause; but the affidavits in shewing cause were intitled *Rex v. Jones*, and held to be right; for till the rule granted there was no cause in court. Rex v. Jones, 1 Stra. 704.

And even after a rule for an information had been granted, and the affidavits produced in shewing cause against that rule were not intitled in any cause; the Court held, that till the rule was made absolute, the affidavits need not be intitled. Rex v. Harrison, 6 T. Rep. 60.

Rex v. Lewis,
2 Stra. 704.

So in moving for a *certiorari* to an inferior court, the affidavits were intitled *Rex v. Lewis*; and objected that there was no such cause then in court; but the Court held it sufficient that there was such cause in the courts below.

Rex v. Sheriff
of Middlesex,
3 T. Rep. 133.
Wood v. Webb,
3 T. Rep. 253.

Till an attachment issues, the proceedings must be on the civil side; after it issues, on the crown side: so that in moving for an attachment the motion and affidavits are to be intitled "*in the cause*;" after the attachment they are to be intitled "*the King v. the persons to be attacked*," in a cause of — v. —.

Rex v. Jolliffe,
4 T. Rep. 285.

2. An affidavit taken before a Judge at Nisi Prius upon an information issuing out of any of the courts above, and which affidavit has been returned, is sufficient, on which the Court will grant an information.

3. "As to swearing affidavits."

Now by rule of court in *Easter Term* 31 Geo. 3. it is ordered, "That where any affidavit is taken by any commissioner from any illiterate person, the commissioner taking it shall certify or state in the *jurat* that the affidavit was read in his presence to the party making the same; and that such party seemed perfectly to understand it; and also wrote his or her signature in the presence of such commissioner."

And by a rule of the Court of K. B. made in *Michaelmas Term*, 37 Geo. 3. "Upon every affidavit sworn in that court, or before any Judge or Commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the *jurat*; and that no affidavit shall be read or made use of in any matter depending in that court, in the *jurat* of which there shall be any interlineation or erasure."

Rex v. James,
1 Show. 397.

4. "And affidavits made in the course of any cause used and filed are good evidence, and admissible at the trial of the cause without further proof; as if taken before a commissioner, that that he was not a commissioner," *ex. gr.*

Cameron v.
Lightfoot,
2 Black. Rep.
8191.

As in this case, which was trespass for false imprisonment of the plaintiff; an affidavit made by the defendant, shewing cause against a rule for discharging the plaintiff out of custody, was admitted without further proof.

S. C. *supra*,
1 Show. 397.

And proof of such a cause depending, and that such affidavit was sworn by the party, would perhaps be sufficient proof even on an indictment for perjury; but the copy of it would not.

Per Ld. Kenyon,
4 T. Rep. 290.

5. Affidavits filed in one cause, may be read as evidence in another, and to affect persons, not parties to the cause; as the attorney, officers, &c.

6. *Voluntary affidavits* are evidence against the party, *Vid. post.* under the head of *Answer in Chancery, how far Evidence.*

Dalmer v. Bar-
nard,
7 T. Rep. 251.
S. C.

7. The Court will take notice of affidavit sworn before foreign magistrates, if properly authenticated.

As where it was taken before J. C., bailiff of the *Ile of Man*, held to be sufficiently authenticated, by a person swearing that he knew the subscription of J. C. to be his hand-writing.

But

But where the affidavit was of the acknowledgment of a warrant of attorney to suffer a recovery taken before an ordinary magistrate in a foreign country, held that it should be attested by a notary. *Ex parte Worley*, 2 H. Black. 275.

In the case however of affidavit from Ireland taken before a high judicial officer there, the Court from courtesy require no such attestation. *Ibid.*

2. HOW MATTERS OF RECORD ARE TO BE GIVEN IN EVIDENCE.

1. As to the general rules of giving them in evidence : 2. How each in particular.

1. How Records in general are to be given in Evidence.

1. "Records are evidences of the highest nature, and are conclusive evidence of the matter in question : no averment is permitted against them ; therefore, whenever a question or cause of action arises on a record, the party cannot deny or aver against the record, but only deny that there is such a record ; that is, by the plea of *nul tiel* record." *Co. Litt. 117.*

"Whenever therefore this plea is pleaded, it shall only be tried by the record itself ; and every matter which can be tried by the record shall be so tried : nor can the party bring it *ad aliud examen*."

As where in *assumpsit* the defendant pleaded in abatement, "That he was an attorney of the court, and so privileged ;" the defendant replied that he was not an attorney, and concluded to the country. On demurrer it was held, That he should have concluded to the record, as the names of all attorneys of the court are kept on a roll, which was a record of the court, and by which it should have been tried, if the party was an attorney of the court or not. *Forster v. Cale*, 1 Str. 78.

So if a man justify the having done a thing as a justice of peace, the question, whether a justice of peace or not must be proved by the record of the commission of the peace. *2 Roll. Abr. 574. pl. 9.*

"But where the issue is on a matter of fact connected with a record, that shall be tried by a jury."

As if the question was, *Whether the defendant did appear ?* that must be tried by the record ; because the appearance ought to be entered on record : but if the question be if the defendant did appear on a day certain, that shall be tried by a jury ; for it is not necessary to enter the day of the appearance on the record. *Hoe v. Marshall*, Cro. Eliz. 131.

So the day-book kept at the judgment office was held not to be evidence of time of signing a judgment. *Lee v. Meacock*, 5 Esp.N.P.C. 177.

If the question be, *Whether J. S. were sheriff of the county of Kent ?* it shall be tried by the record : because every sheriff is appointed by letters patent, which are always recorded. *Abbot of Strata Marcella's case*, 9 Co. 31.

But if the question was, *Whether J. P. were under-sheriff to J. S. ?* that shall be tried by a jury : for the appointment of an under-sheriff is never recorded. *Bro. Trial*, pl. 113.

2 Roll Ab. 524.
pl. 7.

If the sheriff, after having returned *cepi corpus*, plead to an action of escape that the party never was in custody, the question, Whether the party ever was in the sheriff's custody? may be tried by the record of the return.

Ibid. pl. 8.

But if the sheriff had returned *non est inventus*, and an action been brought for the escape, whether the party were arrested or not, shall be tried by a jury.

Hynde's case,
4 Co. 71.

If the question be, Whether a deed be enrolled? it is to be tried by a record of the enrolment: but a question *as to the time of the enrolment* shall be tried by a jury; for such is not necessary to be enrolled.

Rex v. Knolly's,
Ld. Raym. 14.

If the question be, Whether a person has a right to a peerage *by writ*? it shall be tried by a record of the writ: but whether a person have a right to a peerage *by descent*, it shall be tried by a jury; for it never can appear by the record that the person claiming the peerage was descended from him who was first created a peer.

10 Co. 92.

Bull. N.P. 230.
Abbot of Strata
Marcella's case,
9 Co. 30.
Co. Litt. 117 b.
Bro. Ab. Trial,
pl. 40.

2. Records may also be given in evidence by exemplification or by a copy: and in what cases the record itself, or an exemplification, or when a copy is evidence, the distinction is this; where *the record is the ground of the action* it makes part of the pleadings, and appears in the allegations: in such case it is tried *on the issue of nul tiel record*; and it shall be tried by the record, as a record is evidence of itself.

Ibid.
Biggs v. Whar-
ton,
Palm. 524.

But where the record is *only inducement*, in which case it is not traversable, (for nothing is traversable that does not make an end of the matter; and it cannot make an end of the matter if fact be joined with it,) in such case therefore the issue must be on the fact, and be tried by the jury; a copy of the record may be given in evidence to support the fact; for whenever a record is offered to a jury, a copy is evidence.

Co. Litt. 117. b.

So that the difference of the two cases is this: in the former the issue goes to the court; for *nul tiel record* is an issue in which the record itself is the only proof, and that the Court themselves inquire into: for no averment will be admitted against a record; but where the issue is on other matter, and the record is only inducement, as the case of an escape, *en gr.* the writ is inducement and the escape matter of fact; in which case it is only necessary to shew *that there was a writ*, as being an averment in the declaration necessary to be proved; and so a copy is proof of that.

Whitmore
v. Rooke,
Sayer, 299. &
Caf. ibid. cit.

So where the action was debt on a bail-bond by the assignee of the sheriff, the plaintiff alleged a precept, called a bill of *Middlesex*, sued out against the defendant in the original action: the defendant alleged that no such precept issued: the plaintiff replied that there did, as *appears by the records of the court*, and prayed that they might be inspected. On demurrer the question was, If the conclusion was good? and *per Cur.*—The issuing of a writ from another court, as of an original from the Court of Chancery, is never a record of this court, until the return of it is filed;

filed; but the *issuing* of a writ from this court, although no return thereto is filed, is always a matter of record of this court, because there appears on the roll an award of the writ.

Whenever therefore the trial is by the record, that is, on the issue of *nul tiel record*, a day is given to bring in the record; if the record pleaded is a record of another and inferior court, the party pleading it must sue out a *certiorari* to the officer of that court who returns it; and he can only have it by *certiorari*, not by an order on the officer to produce it; but if the record pleaded be of a superior court, there the party pleading it must sue a *certiorari out of Chancery*; into which court when it is returned, it is sent by a *mittimus* from the Chancery into the court where it is pleaded.

Broc. Fail. Rec.
plac. 2.
Ibid. pl. 3.
Hewson v.
Brown,
2 Burr. 1024.
Ibid. plen.

If the record is of the court where it is pleaded, or of a superior court, if it be not brought in on the day given, it is a failure of record; but if it was a record of an inferior court, if it is not brought in on the day, it is not a failure of record; but the party must sue out an *alias* or a *pluries certiorari*; for in this case he is guilty of no neglect, as he is in the two former.

Ibid.

"When the record is brought in it is good evidence, or otherwise under the following distinctions:"

1. "If the record be set out imperfectly or partially, it is sufficient if enough appears to prove the matter in dispute."

Bro. Fail. Rec.
Pl. 4.

As if a man pleads a recovery suffered of one acre, and the record brought in is a recovery of two acres, this is good, and not a failure of record; as if two were recovered, one certainly is.

Ibid.

So if a man declares on a recognizance by J. S., and the record is of a recognizance of J. S. and J. N. jointly and severally, it is good; for J. S. is liable for the whole.

Ibid.

2. "So a variance in a part not material is not fatal."

As if there be pleaded a record of an *outlawry of the plaintiff, at the suit of J. S.*, and on bringing in the record it is an *outlawry at the suit of J. N.*, it is not a failure of record; for the material question is, Is there any outlawry against the plaintiff?

Bro. Fail. Rec.
pl. 1.

So a variance as to a continuance is no failure of record; for the continuance is not a material part of the record.

Coachman
v. Halley,
Hob. 179.

3. "But a variance in a material part is fatal."

As where the plaintiff declared in debt on a judgment of Trinity Term 1787, and on *nul tiel record* pleaded, the record was brought into court, and appeared to be the record of a judgment of Easter Term 1788; this was adjudged to be a failure of record.

Rastall v.
Stratton,
H. Black. Rep.
48.

So where the declaration stated a judgment recovered, at the suit of one, and it appeared to be at the suit of two persons, it was adjudged to be a failure of record.

S. C.

So where there was a variance between the judgment and *nisi prius* roll, it was held fatal: as where the indictment set out that the cause came on to be tried before Lloyd Lord Kenyon, C. J. the *William Jones* being associated: and that in the judgment

Rex v. Eden,
Esp. N. P. Cas.
98.

roll it was "*Roger Kenyon* being associated." This was held a fatal variance.

Parry v. Paris,
Hob. 209.
Hard. 200.

But if a record of *one day of a term* be pleaded, and a *record of another day* be brought in, this is not a variance; for the whole term is but one day in the eye of the law.

Bro. Fail. Rec.
fol. 16.
Bro. Fail. Rec.
pl. 11.

Aliter, where the day is material.

So if a man pleads the outlawry of the plaintiff by the name of *J. S. Knight*, and the record brought in be of *J. S. Gent.* this is a failure of record.

Dyer, 87.

So if the record of the outlawry brought in vary from that pleaded *in the day of the return of the exigent*, it is fatal; for the day is material.

And wherever there is a failure of record, the party pleading it has judgment against him.

Per Lord Mansfield,
Doug. 6.

But it is to be observed, that the records which are of themselves conclusive evidence, are records of *the courts of record in England only*; for though an action lies on the judgment of a foreign court, the record of that court is not conclusive evidence, but the action is debt or assumpsit, and must go to the country.

Walker v.
Witter,
Doug. 1.

Therefore where the action was on a judgment of the courts in *Jamaica*, and the declaration concluded with a *prout patet per recordum*, it was held to be wrong, and was rejected; and the plea of *null tiel record* a mere nullity.

Walker v.
Witter, ante,
Co. Litt. 117. b.

And this doctrine is general as to all courts in *England* not of record, as *ex gr.* the great sessions of *Wales*, which is not a court of record; so of the county-court, hundred-court, and court-baron.

Bull. N. P. 226.

3. Another reason why copies of records should be good evidence, is, that being things of a public nature, to which every one has a right to have recourse, they cannot be transferred from place to place to serve a particular purpose; therefore copies, if properly authenticated, are good evidence; but a copy of a copy is not evidence; for the best evidence the nature of the thing will admit must always be given, and the further any thing is removed from the original truth, the weaker the evidence must be; besides there is a chasm in the proof, because it cannot appear that the first copy was a true one.

These copies therefore are twofold: 1st, Under seal: and 2dly, Not under seal.

1st, Of Copies under Seal.

Bull. N. P. 226.
Tooker v. Duke
of Beaufort,
Sayer Rep. 297.

1. Copies under seal are called *exemplifications*, and are of better credit than any sworn copy; for the courts of justice, by putting their seal to them, attest their authenticity, as done under their authority, by persons more capable to examine, and more critical and exact than another person is or can be.

Exemplifications are twofold: under the broad seal, and under the seal of the Court.

1. Exemplifications under the broad or great seal, are of them- Bull. N. P. 226.
selves records of the greatest validity, and to which the jury ought 10 Co. 93.
give credit under the penalty of an attain.

These records so exemplified under the great seal, are either Ibid.
records of the Courts of *Chancery*, or have issued from it, or are
sent for into the Court of *Chancery* by *certiorari*, which is the
centre of all the courts, and from thence the subject receives a
copy under the attestation of the great seal.

But upon exemplifications under the great seal, it is to be
observed,

1. That nothing but *records* exemplified under the great seal, Bull. N. P. 227.
may be admitted in evidence; for being there preserved by the
proper officer of the court, they are supposed to be free from all
fraud and corruption, and fair and unblotted, so that there can
be no danger from the exemplification; but *deeds* exemplified
under the broad seal cannot be given in evidence; for they being
in the custody of the party, and not of the law, are subject to rai-
sures and interlineations, and therefore ought to be produced
themselves, as the best evidence of the contract.

2. When the record is exemplified, *the whole ought to be exem-
plified*, for the construction must be on the whole taken toge-
ther: however, this rule must be taken with some restriction.
id. post. about giving sworn copies in evidence.

3. "In some cases an exemplification of a record is not com-
plete evidence of all matters contained in it."

As if letters patent be given in evidence, in which it is recited 2 Roll. Ab. 678.
That a certain office was before granted to *J. S.* and that *J. S.* Bull. N. P. 226.

surrendered it to the *King*, who accepted the same, and granted
to *J. D.*;" this is not enough to avoid the title of *J. S.*, *but the
record of the surrender must be shewn*, or a true copy of it; for the
recital of such surrender is not the best evidence that the nature of
the thing will admit; and it would be of dangerous consequence,
if by such sort of suggestion, a man's title might be avoided; but
if letters patent were given in evidence whereby, in consideration 2 Roll. Ab. 681.
of the surrender of former letters patent, the King grants a par-
ticular estate to the party, this would be sufficient proof of the
surrender; for the taking of an estate by the second letters patent,
itself a surrender of the first; the second letters patent are the
best proof of the taking of such estate, and then the surrender is by
operation and construction of law.

So if the question turns on the surrender of a former grant, Earl of Mon-
tague v. Lord
which is denied by the defendant, and to prove the former grant
takes advantage of the recital in the latter, (as in the case first
mentioned,
at above,) he shall be bound by the recital of the surrender; 2 Vent. 170.
for he must take the whole together; but if he only relies on the
former patent which he produces, it will put the plaintiff on proving
the surrender.

So if letters patent recite a former grant to another, and grant
the office to commence from the determination thereof, the
party claiming under the second must produce a copy of the first;
that

Cragg v.
Norfolk,
2 Lev. 108.

that the Court may see that it is determined; for there can be no other proof of the determination of the grant than the grant itself, though perhaps in such case if the recital were that it was determined, the whole recital would be taken together.

Bull. N. P. 227.

2. The second sort of exemplifications are those under *the seal of the court* where the record is kept, and such are of higher credit than any sworn copy; but these can only be of records of that court, under whose seal they are exemplified.

Whitehead's case, cit.
Hard. 120.

And the exemplifications of fines and recoveries under the *town-seal*, where the records were consumed, has been admitted in evidence.

Green v. Proude,
1 Mod. 117.

So has the exemplification of a recovery in a court of ancient demesne being old, and the records lost.

Olive v. Gwin,
Hard. 118.

By stat. 27 *Eliz.* 9. the exemplification of a recovery in *Wales*, or a county palatine, is of the same validity as the original records.

2. Of Copies of Records not under Seal.

These copies are of two sorts; 1. Sworn copies; 2. Office-copies.

Of each of these and how given in evidence.

1. Of Sworn Copies.

Sworn copies are the copies of records which the witness who produces them *swears he examined with the original*; as the copy of a judgment from *Ireland*, *ex gr.* or from one court in *Westminster-Hall* to another.

Bull. N. P. 228.

1. But the copies so admitted must be copies of *records brought into court in parchment*, and not of a judgment, *ex gr.* in paper signed by a master, though upon such judgment you may take out execution; for it does not become a permanent matter till it be delivered into court, and is there fixed as a roll of the court; for until it become so fixed, it is transferrable, as not being a roll of the court; of which only the law allows copies, as they ought not to be transferred from place to place.

Green v. Proude,
1 Mod. 117.
Salk. 285. S.

But a copy may be given in evidence *where the record is lost*, without swearing a true copy; for the record is in the custody of the law, and therefore if lost, there ought to be no injury to the parties' right; and consequently the copy ought to be admitted without swearing to any examination of it, since there is nothing with which it can be compared; but in such case the instrument should be according to the rule required by the civil law *vetustate temporis aut judicaria cognitione roborata*.

2 Salk. 285.

As in ejectment for a rectory, to which a recusant had presented, the record of the conviction being proved to have been burnt, it was allowed to be proved by the estreats into the Exchequer.

Anon.
1 Vent. 257.

So the copy of a decree of tithe in *London* has often been given in evidence without proving it a true copy, because the original is lost.

So

recovery of lands in ancient demesne, where the original possession has gone according to the recovery.

Such a copy is to be given in evidence.

Given in evidence, it must be a copy of the whole 3 Inst. 173.

Int or subsequent words may vary the sense produced.

Copies *post mortem*, and such private offerings, and the return without *also reading* more general concern and notoriety, as in the commission in *Henry the 8th's* time, it would be of ill consequence to have copies of the whole record, as general notoriety that it requires

Per Ld. Hardwicke, Canc. Sir Hugh Smithson's case. Bull. N. P. 228.

Offered in evidence, it is sufficient, if compared it with the original

Rolf v. Dart, 2 Taunt. 52.

Reading it while the officer of the Court reads aloud to him.

2. Of Office Copies.

As to these a difference is to be observed between office-copies given out by a person intrusted by the Court for that purpose, and a copy given by an officer of the Court not intrusted for that purpose: the first are evidence of themselves without proof; the latter is not evidence without proving it actually examined; for every credit is to be given to a party appointed by law to a particular trust as far as it extends, but not to others who are not so intrusted.

Bull. N. P. 229.

Therefore the *chirograph of a fine* is evidence of such a fine, because the *chirographer is appointed to give out copies of the agreement of the parties which are lodged of record.*

Ibid.

But where the *fine is to be proved with proclamations*, (as it must be to bar a stranger,) the *indorsement of the proclamations by the chirographer* on the back of the *chirograph*, is not evidence; for though the *chirographer* is authorized by the common law to make out copies of the fines to the parties, yet he is not appointed by the statutes to copy the proclamations; and therefore his indorsement is not evidence.

Chettle v. Pound, P. Ass. 1700, Bull. N. P. 229. Allen's case, 13 Car. 1. Clayton, 51, S. C.

Therefore it is not enough to give in evidence a copy of the judgment, though examined by the Clerk of the Treasury *, because it is no part of his office; for he is only intrusted to keep the records for the benefit of all men's perusal, not to make out copies of them.

Bull. N. P. 229. * 2. If this should not be further "on being signed by him, and not proved to be ex-

aminated," as in such case a sworn copy is evidence, but it must be proved.

So deeds enrolled by the proper officer are good evidence: aliter, where made out by another clerk not so intrusted.—*Vid. post.*

Bull. N. P. 229.

So of depositions. *Vid. post.*

So a rule of Court produced under the hand of the proper officer is good evidence, without proving it a true copy; for it is an original.

2 Ld. Raym. 745.

And

Per Pratt, C. J.
1 Stra. 307.

And *note*; That when the copy is evidence, the Court will never order the original to be produced, unless there is a suggestion of a rasure or a new entry.

Brocas v. Mayor
and Aldermen
of London,
1 Stra. 307.

Therefore where the plaintiff moved that he might have a copy of the poll, and that Sir J. Ward, who had presided as mayor, might produce the original at the trial; the Court refused to make such an order, as there was no foundation for it; and the copy was evidence.

Rex v. Smith,
1 Stra. 126.

But where a rule was moved for on a justice of peace to produce an examination taken before him at a trial, it was granted, as it was necessary to prove the hand-writing of the party, in order to make it evidence.

2. HOW EACH MATTER OF RECORD MAY BE GIVEN IN EVIDENCE.

Bull. N. P. 225.

1. Of *general acts of parliament*, the printed statute-book is evidence; not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are evidence, because they are hints of what is supposed to be lodged in every man's mind already.

Ibid.

But of *private acts of parliament*, the printed statute-book is not evidence, though reduced into the same volume with the general statutes; but the party ought to have a copy compared with the parliament-roll; for they cannot be supposed to be lodged in the minds of the people.

Per Holt, C. J.
Ca'. R. B. temp.
Gul. 216.
Goodright v.
Skinner,
M. 7 G. 2. C. B.
Bull. N. P. 226.

However, a *private act of parliament in print that concerns a whole county*, as the act of Bedford Levels, for rebuilding Tiver-ton, &c. may be given in evidence, without comparing it with the record: and these things are rather admitted, because they gain some authority from being printed by the King's printer; and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown: and for this reason printed copies of other things of as public a nature have been admitted in evidence, without being compared with the original.

Outran v.
McCrewood,
3 East, 340.

In trespass, a verdict on a fact in issue on a former trial is conclusive in a second action.

Dupays v.
Shepherd,
Cas. K. B. 216.
S. C. as supra.
Rex v. Jeffrie,
1 Stra. 446.

So the printed proclamation for a peace was admitted to be read, without being compared with the original record in Chancery, in order to prove the day of the peace being concluded.

In this case Keble and Rastal's statutes differed; and they who were for adhering to Keble proved, that they had examined him with the parliament-roll; the Chief Justice ruled this to be sufficient, and Keble was read.

2. As to fines, recoveries, judgments, writs, and affidavits, the law as to those, when the original and when a copy is evidence, has been already delivered.

3. As to *verdicts*, it has been decided,

Lee v. Brown,
Poph. 128.
Hard. 118.

1. That if a verdict is offered in evidence, it ought to be proved by the record, and not given in evidence by witnesses; that

that is, by the record itself, or by an exemplification, according as the case is.

But if the jury are agreed and discharged without giving a verdict, it is said that it shall be allowed to be given in evidence, that the jury were agreed, in the case of a common person.

So a nonsuit with proof of the evidence, upon which the plaintiff was nonsuited, may be given in evidence on another action brought by the same party.

2. The bare producing of the *possea* is no evidence of the verdict, without shewing a copy of the final judgment; for it might have happened that the judgment was arrested, or a new trial granted.

But this rule does not hold where the verdict has been given on an issue directed out of Chancery, because in such case it is not usual to enter up any judgment; and the decree in the Court of Chancery is equally proof that the verdict was satisfactory, and stands in force.

But the production of the *possea* is sufficient evidence that there was a trial between the parties, in order to introduce an account of what a witness swore at the trial.

As on an indictment for perjury against a witness for what he swore at a trial, the *possea* is good evidence that there was a trial, so as to introduce the words spoken on which the perjury is assigned.

2. OF PUBLIC EVIDENCE, NOT RECORDS.

These come under the general definition, that they must be such as are evidence of themselves, and do not expect illustration from any other thing: such are court-rolls and proceedings in Chancery: of these too, copies may be given in evidence, inasmuch as there is a plain coherent proof; for there is proof on oath of a matter which, if produced, would carry its own light with it, and by consequence would need no proof.

These form the principal heads following: 1st. Proceedings in Chancery: 2. In the ecclesiastical and other inferior courts: 3. Other public matters in the nature of records.

1. OF THE PROCEEDINGS IN CHANCERY.

Proceedings in Chancery are not records, for the judgment is *secundum equum & bonum*, and not *secundum leges Angliæ*; so that they are not the precedents of justice, as not being memorials of the laws of England, which bind the Chancellor in his determinations.

Under this head, I shall consider, 1st, The bill: 2dly, The answer: 3dly, The depositions: and 4thly, The decree.

1. Of the Bill in Chancery, and how far it is Evidence.

1. It is said that the bill in Chancery is evidence against the complainant; for the allegations of every man's bill shall be supposed

2 Roll. Ab. 680. pl. 5.

Bull. N. P. 243.

Cotton v. Walter, 1 Stra. 162.

Montgomery v. Clarke, 1745, Coram Delegates, Bull. N. P. 234.

Per Pratt, C. J. 1 Stra. 162.

Rex v. Hes, Sitt. London, Mich. 14 G. 2. Coram Lord Raymond. Rex v. Minns, Sitt. West. Tr. 32 G. 3. S. P. ruled.

Bull. N. P. 235.

Ibid. 1 Sid. 232. It is said that

modern practice
is otherwise,
Bull. N. P. 235.
infra.

posed true, and as an admission of the fact; for it shall not be presumed that it was preferred by the counsel or solicitor without the parties' privity, or that they mingled into it any facts which were not true; but in order to make it evidence, there must be proceedings on it; for if there were none, it should rather be supposed to be filed by a stranger to bar the party of his evidence.

Bull. N. P. *ibid*:

As if a patron sue the parson on a bond, and the parson prefer his bill in Chancery to be relieved, stating it to be a simoniacal contract; the bill and proceedings on it may be given in evidence on an ejectment to make void the parson's living.

"But that where the bill is a mere bill of discovery, it should seem that that would not be evidence."

Lord Ferrers
v. Shirley,
Fitzgibbon, 196.

Therefore, on an issue directed out of Chancery, to try the validity of a deed, where one *J. N.* was produced by the defendant to prove that he wrote it by the direction of Lord Ferrers in 1720, and to contradict his evidence, the plaintiffs produced a bill of Chancery, filed in 1719 by the defendant, which mentioned the deed; the Court would not suffer it to be read, though an answer had been put in; for it was no more than the surmises of counsel for the better discovery of the title: but in all cases where the matter is stated by the bill as a fact, on which the plaintiff founds his prayer for relief, it will be admitted in evidence, and will amount to proof of a confession.

Bull. N. P. 236.

"It appears however that the rule of law is now otherwise."

Doe ex dim.
Bowerman v.
Sybourn,
7 T. Rep. 2.

For it was, however, in this case decided, That a bill in Chancery is no evidence of any facts in a cause, except to prove that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or the deposition of witnesses; the evidence offered was a bill filed by the defendant himself, praying relief; and held, That the facts stated in the bill, upon which the prayer for relief was founded, were not to be proved by production of the bill in Chancery.

Taylor v. Cole,
Sitt. Hil. 1789.
6 T. Rep. 3.
in not.

In this case, however, Lord Kenyon admitted a bill in equity filed by an ancestor, as evidence of a family pedigree stated therein.
Vide post.

2. Of the Answer in Chancery, and how far it is Evidence.

1. If the bill be evidence against the complainant, much more is the answer against the defendant, because it is given in on oath.

2 Vent. 70.
Eggleston
v. Speke,
3 Mod. 239.

But an infant's answer by his guardian shall never be admitted as evidence against him on a trial at law; for the law has the tenderness for the affairs of infants, that it will not suffer them to be prejudiced by the guardian's oath: so the answer of a trustee can in no cause be admitted as evidence against his cestui que trust.

Lord v. Grey,
Salk. 286.
3 Ref.

So though an answer is evidence against the party himself, it is none against his alienee.

2. But in giving an answer in evidence, if it is read as the confession of a party, it must be taken altogether, and not that part only.

ly be read which makes against the party whose answer it is; for the answer is read as the sense of the party himself; and if you take it in this manner, you must take it entire and unbroken: therefore if upon exceptions taken, a second answer has been put in, the defendant may insist to have that read to explain what he swore in the first answer.

Earl of Bath
v. Bathersea,
5 Mod. 10.
1 Sid. 418.

“ But though the whole of an answer must be read when it is produced as evidence, yet it does not of course make that part evidence for the party who made it, which is in his own favour; for he shall be called on to prove the allegations which he so makes in many instances.”

As where a bill was filed by creditors against an executor to have an account of the testator's personal estate, the executor set forth by his answer, that he had received from the testator 1100l. which had been left in his hands; that on settling accounts with the testator, he gave the testator a bond for 1000l.; and that the 100l. remaining was given to him for his trouble in the testator's business, and there was no other evidence respecting this 100l.; it was insisted for the executor, That the answer must be taken together, and that it should be allowed to discharge him, since there was the same rule in equity as at law; but it was answered and resolved, That when an answer was put in issue, *whatever was confessed and admitted need not be proved; but that it behoved the defendant to make out by proofs whatever was insisted on by him by way of avoidance*; but that was under this distinction, that where the defendant admitted a fact, and *insisted on a distinct fact by way of avoidance*, he ought to prove that matter of defence; for perhaps he admitted the fact out of apprehension that it might be proved, and therefore such admittance ought not to profit him, so far as to pass for truth, whatever he says in avoidance: but if it had been *one fact*, (as if the defendant had said the testator had given him 100l.) it ought to have been allowed, unless disproved by the plaintiff, because nothing of the fact charged is admitted, and the plaintiff may disprove the fact if he can.

Per Cowper, Ch.
Hil. Vac. 1707-
Bull. N. P. 237.

“ But where an answer is produced in evidence on a collateral matter, not as direct proof of the issue, it may be partially read in evidence.”

As where a witness was produced respecting the title to certain lands, and to prove him incompetent an answer in Chancery was produced, in which the witness swore, That *he had an annuity out of the lands in question*; Serjeant Maynard insisted upon having the whole answer read through; but the Court refused it, as it was only produced to prove the witness incompetent, not to prove the issue.

Sparrin v. Draz,
M. 27 Car. 2.
C. B. at bar.
Bull. N. P. 238.

So if a defendant gives in evidence an answer in Chancery to the plaintiffs, it will not entitle him to avail himself of any matter contained in the answers which are only stated as hearsay.

Roe ex d. Pellatt
v. Ferrars,
2 Bos. & Pull. 541.

3. “ So an answer is no evidence for the party in a court of law, unless so ordered by the Court of Chancery in the case of an issue directed out of it, or unless the other party have made it evidence by producing it first.”

Bull. N. P. 238.

As where in an issue out of Chancery, to try the terms of an agreement which was witnessed by one witness: he being dead before

Bourn v. Sir
Thomas Whit-

more, at Salop, before the trial, the plaintiff was under the necessity of producing a bill and answer in the cause, in order to make the witness's depositions evidence; by that means he made the defendant's answer evidence; which was accordingly read for him.

Bull. N. P. 238. 4. Voluntary affidavits are of the same nature nearly as answers in Chancery, and may be given in evidence against the person who has made them; but there is this difference;

Ibid. That an answer which is the defence to a charge in a court of justice, where the defence is an oath, shall be presumed to be sworn, as it is proved by shewing the bill and answer.

Smith v. Goodier, 3 Mod. 36. But a voluntary affidavit which is no part of any cause depending in court, (as an affidavit that there were no incumbrances, *ex gr.*) must be proved to be sworn; for proving it signed by the party, the proof goes no further than to support it as a letter or note; and as such it may be given in evidence without more proof.

Bull. N. P. 238. Another difference is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot; and the reason is, that the answer is an allegation in a court of justice, and being a matter of public credit, the copy of it may be given in evidence; but a voluntary affidavit has no relation to a court of justice, is a private matter, and not of public credit; and the affidavit itself must therefore be produced as the best evidence; besides, it must be proved to be sworn, which it cannot without it be produced.

Chambers v. Robinson, Trin. 12 G. 1. Bull. N. P. 239. Therefore where in an action for malicious prosecution, the plaintiff offered in evidence to increase the damages, an office-copy of an affidavit made by the defendant in Chancery of his being worth 2500l., Lord Raymond would not let it be read; and the plaintiff was obliged to send for the original into Chancery.

"But in some cases a copy of an answer is not evidence; as in the case of an indictment for perjury on it, though in all civil cases it is."

Bull. N. P. 239. For on an indictment for perjury, though a copy may be offered to, and sufficient to warrant the grand jury to find the bill, yet on the trial the original must be produced, and positive proof given that the defendant was sworn to it.

Anon. 3 Mod. 116. But proof that a person calling himself T. S. was sworn, and that he signed the answer, and proof by another witness of the hand-writing, would be sufficient.

Rex v. John Morris, 2 Burr. 1189. So on an indictment for perjury, an objection was taken, "That there was no proof offered of the identity of the person who swore it, nor even proof that any person at all swore it:" Lord Mansfield ruled at the trial, That proof of the defendant's hand-writing, and that the hand-writing subscribed to the jurat was the master's, as being sworn before him, was proof sufficient that the defendant was the same person, and that he swore it.

And in the last case Lord Mansfield mentioned, That the reason of the order of the Court of Chancery, "That all defendants should sign their answers," was with a view to the more easy discovery of perjuries in answers: and as to the swearing, that it was sufficient proof of the actual swearing by the person charged,

to produce *the jurat attested by the proper officer*, at least sufficient to put the defendant upon proving that he was personated.

But *no return of commissioners* (or of a master in Chancery) of the parties swearing will be sufficient, without some proof of the identity of the person. Bull. N. P. 239.

3. Of Depositions, and how far they are Evidence.

1. The course of proceedings at law being only by *viria voce* testimony, depositions are only admissible *where the witness who made them is dead*, or cannot be procured; for till then they are not the best evidence the nature of the thing is capable of. Godb. 226. Fry v. Wood, 1 Atk. 445.

"Therefore, in order to make depositions evidence at law, it is necessary to shew that the witness was dead, or could not be procured."

As where on the trial of an issue out of the Court of Exchequer, the depositions of a witness, taken fifty years before, were offered in evidence, *but without any evidence, offered that he was dead*, the party relying on the presumption from length of time, which would entitle a deed of that date to be read: but the *Chief Baron* refused to admit it, though he added, *That had proper search been made and inquiry after the witness*, he would have admitted the evidence after such a length of time. Benfon v. Olive, 2 Stra. 920.

2. Depositions may be read in evidence *where the witness has been sought for and cannot be found*; for then he is in the same circumstances as to the party who is to use him, as if he was dead. Bull. N. P. 239.

3. Where it is proved that a witness was subpoenaed, and fell sick by the way, his depositions are evidence; for then it is then the best evidence that can be had, and answers what the law requires. Ibid.

4. "Though a witness was uninterested when his depositions were made, if when called upon to give his evidence he is interested, he can neither be heard, nor are his depositions admissible."

For where in an issue out of *Chancery*, one of the witnesses after his depositions taken became interested, and confessing it on a *voir dire*, was rejected; upon which it was moved to read his depositions as if he were dead; but the Court refused. Baker v. Lord Fairfax, 1 Stra. 101.

So where depositions had been taken *in perpetuam rei memoriam*, and the witness who made them afterwards became heir to the lands, and he was now a party to the suit in ejectment, it was held clearly, That these depositions were inadmissible evidence; for the intent of taking the deposition is only to *perpetuate the testimony of the witness in case of his death*. Tilley's case, 1 Salk. 286.

5. A deposition cannot be given in evidence against any person who was not a party to the suit, 'as it is a matter of justice that the party should have the privilege of cross-examining him: therefore depositions in *Chancery* shall never be given in evidence on an indictment or information; for in these the king is a party, which he was not to the civil suit. Rushworth v. Countess of Pembroke, Hard. 472.

Neither can these depositions be read *for a stranger against a party to the suit*: for as they could not be given in evidence against such stranger, neither shall they be given in evidence for him. Ibid.

Stanley v. Begg,
Hard. 22.

Nor for a stranger to the suit against a purchaser under the party. As in the case of a bill filed by several commoners, for their common which is decreed.

But to this rule there are some exceptions.

Bull. N. P. 239.

1. In the case of customs and tolls.

Bull. N. P. 240.

2. In all cases where *hearsay and reputation are evidence*, depositions in any cause are evidence: for what a witness who is dead has sworn in a court of justice, is of more credit than what another person swears he has heard him say.

Sparvin v. Drax,
Mich. 27 Cal. 2.
Bull. N. P. 240.
Per Ld. Kenyon,
4 T. Rep. 290.

3. So where a witness in a cause swears to any fact, what that witness has sworn in depositions in another cause shall be admitted to contradict him.

1 Chan. Caf. 73.
Sir Martyn
Nowel's case,
1 Keb. 146.

4. So in Chancery it is the usual practice to read depositions taken in one cause as evidence in another, saving all just exceptions — as that they are between other parties.

Howard v.
Tremain,
4 Mod. 146.
5 Mod. 211.

6. To make depositions evidence, they should regularly be taken upon bill and answer, which are proved to have been filed.

And it shall be sufficient proof that they were so, by the fix clerks' book, mentioning them in the enrolment of the decree, though then lost.

Hob. 112.

Bull. N. P. 240.

This is where the depositions are not of a very ancient date, for formerly they did not enrol the bill and answer, and therefore *ancient depositions may be given in evidence, without proof of the bill and answer*; so depositions taken by the command of Q. Eliz. upon petition, without bill or answer, were, on solemn hearing in Chancery, allowed to be read.

But though proof of the bill and answer is necessary, in order to make the depositions evidence, yet this is to be taken with some restriction.

Howard v.
Tremain,
4 Mod. 147.
Sir Th. Raym.
335.

"For if a bill is filed, if *the defendant stands out to a contempt*, depositions taken are evidence, for then it is the party's own fault that he did not cross-examine the witnesses: but depositions taken before answer put in, are not admitted to be read, unless the defendant appears to be in contempt; for if there does not appear to be a cause depending, the depositions are considered as mere voluntary affidavits."

Howard v.
Tremain,
1 Saik. 278.
1 Show. 363.
S. C.

Therefore where a bill was filed by the devisee, to perpetuate the testimony of witnesses; the defendant, the heir at law, stood in contempt and would not answer, and thereupon the plaintiff had a commission, and examined the witnesses to the matter of his bill *de bene esse*; the defendant joined in the commission, and cross-examined some of the witnesses; before, however, he put in his answer, some of the witnesses died. These depositions were held to be good evidence, as otherwise the devisee might lose the benefit of their testimony, as the heir would not answer the bill, nor call the devise in question, till after the witnesses were dead.

— v. Brown
& alr.
Hard. 315.

But if the depositions of witnesses are taken *de bene esse*, before the coming in of the defendant's answer, *the defendant not being in contempt*, such depositions are not evidence, because the opposite party had not the benefit of cross-examination; and the rule of the

the common law is strict, that no evidence shall be admitted, but that is or might have been under the examination of both parties; but perhaps in Chancery, on a special motion, it might be ordered to be read.

"In all other cases it seems that proof must be given of the bill and answer; that is, proof that a cause was regularly before the Court of Chancery, upon which the depositions were taken."

For if a cause be dismissed for irregularity of the complaint, the depositions made in it can never be read, for there was no cause regularly before the Court but where the bill is dismissed, because the matter is not proper for equity to decree on; yet depositions on the facts in the cause may be read afterwards in a new cause between the parties.

If a witness in his answer refers to a paper which is not of itself evidence, as containing a statement of facts to which he is interrogated, the paper may be read as part of his deposition.

Backhouse v. Middleton, 1 Ch. Cal. 175.
Smith v. Veele, 1 Ld. Raym. 735.
Pe Holt, 2 Jones, 164.

Falconer v. Haufon, 1 Campb. 171.

4. Of the Decree, and how far it is Evidence.

A decree in Chancery or the Exchequer may be given in evidence between the same parties, or any claiming under them; or their judgments must be of authority in those cases where the law gives them jurisdiction; and it would be absurd not to ascribe what is done by virtue of that jurisdiction to be full proof.

7. So a decretal order in paper with proof of the bill and answer, or if they are recited in the order, is good evidence.

2 Mod. 237.
Trowel v. Castle, 1 Keb. 21.

Ibid.

OF THE PROCEEDINGS IN THE ECCLESIASTICAL AND OTHER INFERIOR COURTS.

1st, How far they are evidence: 2d, How they are given in evidence.

1. "With respect to these matters, it is in general to be observed, That wherever any court, ecclesiastical or civil, possesses a competent jurisdiction, the decree, sentence, or judgment of that court is conclusive evidence of that matter whenever it arises collaterally in question in any other court of justice in the kingdom."

Therefore, where the action was for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living with her in adultery, the plaintiff proved the marriage by a parson and a woman; to encounter which the defendant produced a sentence of the Consistory Court of London, in a cause of jactitation of marriage, brought by the supposed wife against the plaintiff, wherein she was decreed free from all contract, and perpetual silence imposed on the plaintiff. This was ruled by Lord Hardwicke Ch. J. to be conclusive evidence; and the plaintiff was nonsuited.

Clews v. Bathurst, 2 Stra. 960.

So where the action was on a contract of marriage, and the defendant pleaded *non assumptit*: on the trial the defendant offered in evidence a sentence of the Spiritual Court in a cause of contract, against which the Judge had pronounced sentence, and declared

Da Costa v. Villa Real, 2 Stra. 961.

Mrs. Villa Real free from all contract. The judge ruled this to be conclusive evidence against the plaintiff, who was therefore non-suited.

Prudam v. Phillips,
M. 11 G. 2.
Ibid. in margin.
Ekins v. Smith,
Sir Th. Raym.
336.

And it was afterwards ruled in this case, that the sentence was so conclusive, that the judge would not admit evidence of fraud or collusion in obtaining it.

So in an action of *trover* for goods, judgment of condemnation in the Court of Exchequer in an information would be conclusive.

2. "But in order to make the sentence of such Court conclusive evidence, the question must have come directly before them, and not collaterally; nor shall the sentence be allowed to prove another matter collaterally."

Bull. N. P. 244.

Therefore, if in an information against *A. B.* issue is taken on the fact, *whether on such a year T. S. was mayor?* and it is found that he was not; if another information is filed against *C. D.* and the same issue joined, the finding and judgment in the last case is not evidence in this.

Blackham's case,
1 Salk. 290.

So where in *trover* for goods, upon evidence, the plaintiff having proved his possession, and the taking of them by the defendant, the defendant shewed, That the goods belonged to one *Jane Blackham*, to whom he had administered: the plaintiff then proved, That some days previous to her death, she had been married to him; it was then insisted for the defendant, That the Spiritual Court had determined the right to be in the defendant, for they could not have granted administration to him but upon supposing that there was no marriage, and that this sentence being on a matter within their jurisdiction, was conclusive: but *per Holt*—Their sentence is conclusive where it has been directly decided; such cannot be contradicted by evidence; but it is otherwise where a collateral matter is to be inferred from the sentence; such may be examined on evidence.

Robins v. Crutchley,
2 Will. 121.

So where in dower the defendant pleaded *ne unques accouple in loyal matrimonie*; the plaintiff replied, That Sir *William Wolfey* had exhibited a libel in the Ecclesiastical Court, charging her with having committed adultery with *John Robins*, and praying for a divorce; that to that libel she pleaded, That she was the wife of *Robins*, and not of Sir *W. Wolfey*; that before the cause was heard *Robins* died; but that afterwards the cause was heard, and the Court decreed, That she had been lawfully married to *Robins*: this was on demurrer held to be a bad plea, for the sentence might be by collusion; it was a determination to bind the right of land, to which the defendants or their ancestors had not been parties; besides, the only mode of trying the validity of a marriage is by the bishop's certificate.

S. P. Dutcheffs of Kingdon's case, ruled on an indictment for polygamy.
Leach, Cr. Cal.
148.

"In this case it is observable, that the point to be ascertained, was the marriage of the plaintiff with *John Robins*; that that was not the direct question before the Spiritual Court, which was on the adultery; therefore, the question was only collaterally decided, and so could not be conclusive: but it is there said, That if it had come directly in question on the bishop's certificate, that would be conclusive."

3. But the sentence of the Ecclesiastical Court, in order to be decisive, must be positive in ascertaining the right: for where in case for disturbing the plaintiff in a pew, it appeared, That upon libel in the Consistorial Court, the Court had adjudged the right to be in the plaintiff; but that on an appeal to the arches, *that Court had reversed the former sentence*: it was held, That this was not conclusive evidence for the defendant.

Crofts v. Salter,
3 T. Rep. 639.

Therefore in dower, if the defendant plead *ne unques accouple*, &c., and the bishop certifies on this issue that the parties are married, and such certificate be inrolled, and judgment given for the demandant thereon: *in the like action against another tenant, the defendant will be concluded from pleading the like plea*; for the matter having been *ex directo* determined between the parties, so that it can never be again controverted by them, *the record is conclusive evidence of such fact against all the world*.

Bull. N. P. 245.

4. "And courts take the same notice of the adjudications of foreign courts in matters of which they have cognisance, and hold the sentences of such courts conclusive evidence; nor will the Courts here examine into the grounds of their decision, if the matter appears to be within their jurisdiction."

Saloveci v.
Johnson,
Ante, 145

As in an action on a policy of insurance, with a warranty that the ship was *Swedish*, a sentence of the French Court of Admiralty condemning the vessel as *English* property, was held to be conclusive evidence.

2 Show. 232.
Barzillay v.
Lewis,
Ante, 145. S. P.

Vid. Bolton v. Gladstone, 5 East, 155.

5. "But in order to make the proceedings in the inferior courts conclusive evidence, such courts should have *complete jurisdiction* of the whole matter which is the object of the cause."

Burton v.
Fitzgerald,
2 Stra. 1072.

"Therefore, if the suit is in the Ecclesiastical Court, if it is mixed with any matter of temporal cognizance, there the sentence is not conclusive evidence."

Therefore, if a man devise *lands*, the probate of the will in the Spiritual Court cannot be given in evidence; for all the proceedings there, as far as relate to land, are *coram non iudice*: for having no authority to authenticate any such devise, a copy of a will under their seals is no evidence of a true copy.

1 Roll. Ab. 678.
Bull. N. P. 245.

But the probate of the will of personal estate is good evidence, because they have the custody of all wills that concern personal estate, and they are the records of that court, and therefore a copy of them under the seal of the court must be good evidence; and this is still the more reasonable, because it is the use of the court to preserve the original will, and only give back to the party copies of it, under the seal of the court.

But to this are the following exceptions:—

1. "Where the party who wants to use the will of lands in evidence cannot procure it, in such case the ledger-book is evidence."

As where in avowry for a rent-charge the avowant could not produce the will under which he claimed, as it belonged to the devisee of the land, who was the plaintiff in the action: in such case it was held admissible evidence, and sufficient to charge the plaintiff to produce the ordinary's register of the will, and to prove former payments.

Anon.
Cas. K. B. Rep.
Gul. 246.

Sed quære, If according to modern practice, the plaintiff should not have had notice to produce it?

2. "Where a will of lands is wanting to *prove a collateral matter*, as a descent, *ex gr.* in such case the ledger-book of the ordinary is evidence."

Dike v. Polhill,
Ld. Raym. 744
Pettit v. Pettit,
1707.
Bull. N. P. 246.

As if it was necessary to prove the relation of father and son, in such case the ledger-book would be evidence: for the ledger-book is not merely a copy, but is a roll of the court; and though the law does not allow these rolls to prove a devise of lands, yet when the will is only to prove a relation, in such case the rolls of the Spiritual Court, that has authority to enrol all wills, are sufficient proof of such testament.

Bull. N. P. 246.
Davis v. Williams,
13 East, 232.

But a copy of the ledger-book is not evidence.

And an examined copy of the act book in the registry of the prerogative court of *Canterbury*, stating that administration was granted to the defendant of her husband's goods at such a time, was held to be evidence of her being such administratrix in an action against her as such, without giving her notice to produce the letters of administration.

6. On this head it is further to be observed,

"That where any inferior or other court has competent jurisdiction, and their sentence, decree, or judgment is final, *such decree, sentence, or judgment shall be conclusive and final in any other court of concurrent jurisdiction.*"

Hutchinson's
case,
Temp. Car. 2.
quoted Show, 6.

Therefore where the defendant, having killed a man in *Spain*, was there prosecuted, tried, and acquitted, and afterwards was indicted here, it was held, That he might plead that acquittal in *Spain* in bar; because the final determination of a court of competent jurisdiction, is conclusive to all courts of concurrent jurisdiction.

Bull. N. P. 245.

So, as before-mentioned, in cases of *dower*, upon which the bishop has once certified marriage, *that shall in every other case be conclusive*, because that is the proper jurisdiction by which it is tried.

"But this rule is confined to cases of concurrent jurisdiction only."

Boyle v. Boyle,
3 Mod. 164.

For though a conviction in a court of criminal jurisdiction is conclusive evidence of the fact in a court of civil jurisdiction, yet an acquittal is no proof of the contrary: as if the father was convicted on an indictment for having two wives; this would be conclusive evidence in ejectment, where the validity of the second marriage was disputed: but an acquittal would not prevent the party from giving evidence of the former marriage so as to bar the issue of the second, for an acquittal ascertains no fact as a conviction does; nor would a conviction be conclusive so as to bar the party in a writ of dower, or in an appeal where the legality of the marriage comes in question; however, it would be evidence before the bishop on the issue of *ne unques accouple*; for though the fact of the marriage be not conclusive evidence of the legality of it, yet it is *prima facie* a proof of it.

Lord Howard v.
Lady Inchiquin,
1700.
Bull. N. P. 285.

Thurston v.
Slatford,
Salk. 284.

7. A record of the *sessions* in which his admission was entered, is good evidence to prove that a public officer had not taken the oaths by which he forfeited his office.

2. As to how these Matters are to be given in Evidence.

1. We have observed before in what cases the original will must be produced, and in what cases the probate.

As it often happened that the will concerned both personal and real estate, in which case the Ecclesiastical Court had a right to the custody, on account of the personalty, before the year 1718 the method was to deliver out a will of lands, to be proved at trials *on security being given*; but after that the registers refusing to deliver it, but attending with it themselves, and making exorbitant charges for their attendance, the Court in this case ordered it to be delivered out on security. However, the present practice is for an officer of the Commons to attend with it.

Morse v. Roach,
2 Stra. 961.

2. The Ecclesiastical Court never grants an exemplification of matters of administration, but only a certificate that administration was granted; therefore where a lessee pleads an assignment of a term from an administrator, such certificate is good evidence: so would the book of the Ecclesiastical Court, wherein was entered the order for granting administration: so would the copy of the probate of the will be evidence that S. S. was executor; but a copy of the will would not be evidence of it.

Hempton v.
Cross, Ed. 8 G. 2.
K. B.
Bull. N. P. 246.
Garrett v. Lytton,
1 Lev. 25.
Smartle v.
Williams,
Cit. Hardw. C.
Bull. N. P. 246.

So where the question was as to a title under an administration which was not produced, nor of any search having been made after them, the administratrix being dead, the original book of acts from the surrogate of the diocese's office, directing letters of administration to be granted, with the surrogate's fiat to the same, was held to be evidence of the title of the party to whom the administration was directed to the effects of the intestate.

Elden v. Keddell,
8 East, 187.

3. Though in a suit relating to the personal estate, the probate of the will under the seal of the Ecclesiastical Court is sufficient evidence, yet the adverse party may give in evidence that the probate is forged, because such evidence supposes that the Spiritual Court has given no such judgment, and so there is no reason that the Spiritual Court should be concluded by it; but it cannot be given in evidence that the *will was forged*, because the Ecclesiastical Court has decided, by granting the probate.

Noell v. Wells,
1 Sid. 359.
Raym. 405.

So the adverse party may prove that the testator left *bona notabilia*, against the probate by an inferior court; for in that case the inferior court had no jurisdiction, as the administration should be a prerogative one.

Ibid.

So if letters of administration are shewn under seal, you may give in evidence *that they were revoked*; for this is in affirmation of the proceedings in the Spiritual Court, and does not controvert the propriety of their decision.

Ibid.

So neither can it be given in evidence that the testator was *non compos*, for that the Spiritual Court have power to decide, and have decided by granting probate, and that is conclusive.

Ibid.

4. A copy of depositions sworn at a judge's chambers, delivered at by his clerk and attested by his signature, is admissible evidence, without proof of its being examined with the original.

Duncan v.
Scott,
1 Campb. 101.

3. OF OTHER PUBLIC MATTERS IN THE NATURE OF RECORDS.

Bull. N. P. 247.

1. *The rolls of a court-baron* are evidence; for they are the public rolls by which the inheritance of every tenant is preserved; and they are the rolls of the manor-court, which was anciently a court of justice, relating to all property within the manor.

Den ex dim.
Goodwin v.
Spray,
1 T. Rep. 466.

So where the question was respecting the mode of descent of certain copyhold lands, a *customary was produced in evidence by the steward of the manor, as the customary of the manor*: he had received it from his predecessor in 1748, who had received it from his; it was of great antiquity, and handed down along with the rolls of the manor, *but it was not signed by any person* to evidence its origin or authenticity: the Court held nevertheless, That under the circumstances under which it had so been transmitted, joined to its antiquity, it was good evidence.

Ree ex dim.
Beebe v.
Parker,
5 T. Rep. 26.

And when an entry from the court rolls of a manor is given in evidence in order to ascertain the mode of descent of lands within the manor, such entry is good evidence, though no evidence is offered that it has ever been put in use, or that any person had taken lands by descent under it.

Snow v. Cutler
& alts.
1 K. b. 567.
Comb. 138.
Rex v. Jevins,
Comb. 337.
12 Mod. 24.
Rogers v.
Allen,
1 Campb. 309.

And a copy of a court-roll under the steward's hand, is good evidence to prove the copyholder's estate.

So an examined copy of the court-roll is good evidence, if sworn to be a true one.

So where the question was as to a right of fishery: to prove a presumptive right of fishery as appurtenant to a manor, old licences on the court rolls granted by the lords, in consideration of rents, to fish in the *locus in quo*, are evidence, without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manors have exercised other acts of ownership of the fishery.

Bull. N. P. 247.
Salk. 281.

2. *The register of christenings, marriages, and burials* is good evidence, or the copy of it: and it is said, that proof *in vivo* of its contents, without a copy, has been held good evidence: but Just. Buller doubts it, as it certainly is not the best evidence that the nature of the thing is capable of.

Stead v. Heaton,
4 T. Rep. 669.

So where the question was, Whether by custom the chapelry of *Haworth* ought to contribute one-fifth of the money raised to support the parish church of *Bradford*, of which *Haworth* was a vill: to prove it on the part of *Bradford*, the parish book was produced, in which was an entry made by their own churchwardens in 1679; it was in these words:—"Received of *Haworth*, who this year disputed our ancient custom, but when sued paid it, 8*l.* and 1*l.* for costs." At the head of the page was this entry:—"It is an ancient custom thus to proportion church-lay—*Haworth* one-fifth, *Bradford* a third of the remainder," &c. &c. It was objected, That these entries, being by the parish-officers of *Bradford*, could not be made evidence in support of their right against *Haworth*: but the Court held, on a motion for a new trial, (the evidence having been admitted,) That the receipt was clearly evidence of the receipt of money sufficient to charge the officers, and that referring to the

the entry in the same page respecting the custom, was good and admissible.

"And it seems that books of that public nature shall be conclusive evidence of the matters of which they are proper registers."

For where on question concerning the plaintiff's legitimacy, he produced the general registry of the parish wherein he was registered, as the son of his father and mother, in the same way that lawful children are entered.—This registry, the clerk said, was made from a day-book, from which the entries were made in this register, once in every three months; and the entries were made in the day-book immediately after the christening, or next morning. To encounter this, he was asked by the defendant if any notice was taken of bastards? he said, their method was to add *B. B., base-born*. The defendant then offered the day-book from whence the other entry was posted, in which *B. B.* was inserted; and they insisted that this was the original entry. This was opposed: the opinion of the Court was taken; Just. *Page* was for admitting it, but the two other judges were against it; saying, the other was the only register, and there could not be two registers in one parish; so it was rejected.

But the registers of the marriages formerly solemnized in the Fleet are not evidence of marriage.

Neither is the copy of a register of a marriage in a foreign chapel evidence.

3. *Corporation-books* are good evidence where they are publicly kept as such, and entries made by the proper officer; or if that officer be dead, or sick, or refuses to attend, entries made by other persons may be good; but these matters must appear: and when the book is produced, it must be established.

But where in a case of *quo warranto*, a book was produced which appeared to be only minutes of some corporate acts ten years before, *all written by the prosecutor's clerk, who was no officer of the corporation*; this was opposed on the ground that it never was kept among or esteemed one of the corporation-books, in which the entries were all made by the town-clerk; and there being some suspicion respecting the book, the Judge, before he would admit it, required an account by whom it had been kept for the ten years? and whether any body had seen it before? which the prosecutor not being able to satisfy him in, the book was rejected.

So where the question was, Whether *A. B.* at the time he did a corporate act was an out-burgess or not? and to prove it, the defendant who had a rule to inspect, and take copies of all the books and records of the borough, produced a copy of a letter fifty years old, and found in one of the corporation chests, wherein *A. B.* was mentioned to be of another place: The Court refused to admit it to be read, for it was not a corporate act within the rule; so that a copy was not evidence; but the original should itself be produced.

4. If the question be, Whether a certain manor be ancient demesne or not? the trial shall be by *Doomsday-book*, which will be inspected in court,

May v. May,
2 Stra. 1073.
Trial at bar before
Page, Probyn, & Lee, Just.

Reed v. Passer,
Espin. N. P.
Cal. 213.
Leader v. Barry,
Esp. N. P. C. 353.

Per Cur.
1 Stra. 93.

Rex v. Motherfell,
1 Stra. 93.

Rex v. Gwin,
Mayor of
Christchurch,
1 Stra. 401.

Anon.
Hob. 188.

In

Gregory v.
Withers,
Hil. 28 Car. 2.
Bull. N. P. 248.

In ejectment for the manor of *Ardam*, the defendant pleaded ancient demesne, and when Doomsday-book was brought into court, would have proved that it was antiently called *Nettam*, and that *Nettam* appeared by the book to be ancient demesne; but he was not permitted to give such evidence; for if the name was varied it ought to have been averred on the record.

Bull. N. P. 448.

5. There is in the *Exchequer* a particular survey of the king's ports, which ascertains their extent; this therefore is good evidence on a question respecting their limits, or whether a thing be done in or out of the ports.

Salk. 281.
2 Jones, 224.
Bull. N. P. 248.

6. The rolls, or ancient books of the herald's office, are evidence to prove a pedigree; but an extract of a pedigree taken out of their records shall not; for it is not the best evidence in the nature of the thing, and a copy of the records might be had.

Pitton v. Walter,
3 Stra. 162.

So where the question was, Whether the lessor of the plaintiff was heir at law to him that last died seised? to prove the pedigree, the Chief Justice admitted a visitation in 1623, made by the heralds, entered in their books, and kept in their office, to be read in evidence; he also admitted a minute-book of a former visitation, signed by the heads of the several families, which was found in Lord Oxford's library.

Downes v.
Moorman,
Bunb. 160.

So the copy of an old agreement where the original was in the Bodleian library, from whence the Oxford statutes prohibit it to go out, was held good evidence.

Ex dim. Whitcomb v. —,
P. 6 Ann. C. B.
Bull. N. P. 249.

7. The register of the navy-office, with proof of the method there used to return all persons dead with the mark *D. D.* is good evidence of the death of any person.

Robert Rhodes's
case, 1 Leach's Cr.
Cas. 23.

So on an indictment for forging a seaman's will, the muster-book of the navy-office is good evidence to prove the identity of the supposed testator.

Barber v.
Holmes,
3 Esp. N. P. C.
190.

But in an action in which the defendant set up coverture, as the wife of one *Holmes*, who was stated to be a serjeant of marines on board a king's ship, it was ruled, by Lord *Kenyon*, that the production from the Admiralty of the muster of the ship, in which the name of the supposed husband was found, was not sufficient to establish the fact of the husband being living, without further proof of the identity.

Vicar of Kel-
lington v. Master
and Fellows of
Trinity College,
Cambr & alt.
1 Will. 170.

8. An ancient survey from the first fruits office of the possessions belonging to a nunnery, which survey was taken in the year 1563, upon the dissolution of the monasteries, *tempore Hen. 8.* respecting the endowment of a vicarage, though it did not appear by what authority that survey was taken, was held to be good and sufficient evidence.

Palm. 38.

9. The pope's bull is evidence upon a special prescription to be discharged of tithes, as to prove that such lands belonging to such a monastery, were discharged at the time of the dissolution, for then they continue discharged by the act of parliament of *Hen. 8.*; but it is no evidence on a general prescription to be discharged, because there appears a commencement of such a custom; and a general prescription is that there was no time or memory of the thing to the contrary.

So the pope's licence without the king's, has been held good evidence of an impropriation, because anciently the pope was holden supreme head of the church, and therefore to have the disposition of all spiritual benefices, with the concurrence of the patron, without any regard to the king; and these ancient matters must be judged according to the error of the times in which they were enacted.

10. An old terrier or survey of a manor, whether ecclesiastical or temporal, is good evidence; for there is no other way of ascertaining old tenures or boundaries. Bull. N. P. 248.

But a survey made by one party without the privity or concurrence of the other, is not admissible evidence. Anon. 1 Stra. 95.

So a terrier or map of a parish, though found among papers handed over by the late to the present incumbent as part of papers belonging to the parish, is not evidence, if not signed by the parishioners or officers belonging to the parish, to ascertain the boundaries of the parish. Earl v. Lewis, 4 Esp. 1.

Neither is a copper-plate, describing a particular road as a public one, evidence that it is so. Pollard v. Scott, Peake N. P. C. 18.

9. So where to prove a place the public road, a copper-plate map was produced, wherein the close in question was described as a public road, and purporting to have been taken by the direction of the churchwardens for the time, and evidence offered that it was generally received in the parish as authentic; Lord Kenyon rejected the evidence, saying it would be equally improper as to receive in evidence a plan taken by the lord of a manor, who might thereby crush and destroy the estates of his tenants. Pollard v. Scott, Peake, N. P. Caf. 18.

So a terrier of glebe is not evidence for the parson, unless signed by the churchwardens as well as by the parson; nor then if they be of his nomination: and though it be signed by them, it deserves very little credit; unless it be also signed by the substantial inhabitants; but in all cases it is strong evidence against the parson. Bull. N. P. 248.

11. A general history may be given in evidence to prove a matter relating to the kingdom in general, but not to prove a particular right or custom; therefore in the case of *St. Catherine's Hospital*, Ch. J. Hale allowed a chronicle to be evidence of a particular point of history in *Edw. 3d's* time: so a year-book is evidence of the practice of the court; therefore *Camden's Britannia* being produced to prove a right respecting the digging of salt-pits at *Nantwich*, it was rejected. Rex v. Burgess of Droitwich, Salk. 28.

So where the question was, If it was an inferior abbey? *Dugdale's Monasticon* was refused, as the original records were in the Augmentation-office.

12. The certificate of the commissioners for stating the army debts is conclusive evidence, nor can the party be admitted to impeach or improve it by evidence. Moody v. Thurston, 1 Stra. 481.

But in such case the certificate must be made by them sitting commissioners; for where it had been signed by them at their own houses and apart, it was rejected. Mountcan v. Wilson, 1 Stra. 56.

13. An

Baxter v. Seer
& alt.
2 Keb. 277.

13. *An inventory taken by the sheriff on an execution, is evidence between strangers, to prove the quantity and value of the goods; for the law intrusting him with the execution must trust him throughout.*

Aicle's case,
Leach, Cro. Caf.
330.

14. In an indictment against a prisoner for returning from transportation before the term of it expired, it was necessary to prove the precise day on which the prisoner had been discharged from *Newgate*: to prove it the *daily book, kept by the clerk of the papers*, containing entries of the names of the prisoners when brought in and when discharged, was held to be good evidence, though it appeared that the entries were made partly from the information of the turnkeys, and partly from their indorsements on the writs, and not from the clerk of the papers own knowledge; for being things of a public nature, credit was to be given to them till it was impeached.

2 Roll. Ab. 670.
Litt. Rep. 167.

15. It is a general rule, that *depositions taken* in a court not of record, shall not be allowed in evidence elsewhere: so it has been holden in the case of depositions in the Ecclesiastical Court, though the witness is dead.

"And the rule seems to be general, that except when provided for by particular statutes, the depositions of witnesses on oath are not evidence, unless the parties to be affected by it have had the benefit of cross-examination, even though such witnesses could not be produced in person."

Rex v. Paine,
3 Salk. 281.

Therefore in an information for a libel against government, and not guilty pleaded, the *Attorney-General* offered in evidence *depositions taken before a justice of the peace*, relating to the fact, the deponent being dead, &c. — *Per Cur.* Upon advice with the justices of the Common Pleas, depositions taken before a justice of peace, if the deponent die, may be made evidence by stat. 1 & 2 P. & M. 13. but it extends only to the case of felony, not to this case.

"This was the doctrine held by Lord *Kenyon* and Justice *Grose*, in the following case; Justices *Ashburft* and *Buller* dissent."

Rex v. Eriswell,
3 T. Rep. 707.

A pauper then residing in the parish of *Icklingham*, where it was apprehended he was not settled, was taken up by the parish-officers of that parish, and brought before two justices for the purpose of being examined concerning his settlement; in consequence of which he was examined, and his examination signed by himself before the justices; but no removal then took place: he continued to reside in *Icklingham* for some years, when he became *insane*, and the question was, Whether the examination so taken was evidence or not? when the Court were equally divided on the question.

But to this rule are the following exceptions:

1. By statute 1 & 2 Ph. & M. 13. and 2 Ph. & M. 10. "Justices of peace shall examine of persons brought before them for felony, and of those who brought them, and certify such examination to the next gaol-delivery; but the examination of the prisoner shall be without oath, and the others upon oath, and these

" these examinations shall be read against the offender upon an indictment if the witnesses be dead."

So where an accomplice had made a full confession in writing, and given information upon oath against the prisoner, before Lord Ch. Just. *Lee*, pursuant to 1 & 2 *Pb. & M.* 2 & 3 *Pb. & M.* but before the prisoner was brought to trial the accomplice died: it was adjudged, That the depositions so taken were admissible evidence.

Westbeer's case,
Leach, Cro. Car.
14.

Upon this principle, where a pregnant woman had made her examination before a justice of peace, charging a certain person to be the father of a bastard child, and died two hours after her delivery; it was decided, that the examination so taken was admissible evidence before the court of Quarter Sessions, in order to make an order of filiation on the party so charged, the examination having been taken in the course of a judicial proceeding, and was likened by the Court to proceedings under stat. 1 & 2 *Pb. & M.*

Rex v. Raven-
sone,
5 *T. Rep.* 373.

By stat. 33 *Geo. 3. c. 39. § 33.* which was the mutiny act of that year, two justices are empowered to take the examination of a soldier as to his settlement, and then orders them to give an attested copy of such examination to the soldier to be delivered to his commanding officer, and makes such attested copy evidence when produced.

As this *ex parte* examination is made evidence by the statute, contrary to the established rules of evidence, the Courts will construe the statute strictly, and therefore refused to admit any other attested copy of such soldier's examination to be evidence, except that which is by the statute so ordered to be delivered to the soldier as aforesaid.

Rex v. Inhabi-
tants of Clayton-
-le-Moors,
5 *T. Rep.* 704.

3. By stat. 5 *Geo. 2. c. 30. § 41.* " The depositions before commissioners of bankrupt are ordered to be recorded, and that copies of such record of the depositions shall and may be given in evidence to prove such commission, and the bankruptcy of such person against whom such commission hath been or shall be awarded, or other matters and things when the witness is dead."

And depositions so taken and recorded, are good and admissible evidence to prove the precise time when an act of bankruptcy was committed.

Janfon, Affig. of
Burton, v. Wil-
son,
Dougl. 244.

So we have seen, *ante*, ch. of *Trover*, that the proceedings before commissioners of bankrupt are made evidence by stat. of the trading petitioning creditor's debt and act of bankruptcy.

4. If the witnesses examined on the coroner's inquest be dead or beyond sea, their depositions may be read, for the coroner is an officer appointed on behalf of the public to make inquiry about the matters within his jurisdiction, and therefore the law will presume the depositions before him to be fairly and impartially taken.

Bromwick's case,
1 *Lev.* 180.
2 *Jones*, 53.

5. Analogous to depositions is the evidence before given by a witness: as to which it has been decided, that in courts of law, the evidence which a witness gave on a former trial may be used on a subsequent one, if he die in the interim; as was agreed on all hands at a trial at bar in Lord *Palmerston's case*; but in such case it is not sufficient to swear to the effect of the words used by

Per Ld. Kenyon,
4 *T. Rep.* 290.

the

the witness at the former trial, but the words themselves ought to be given.

Green v.
Gatwick,
Mic. 24 Car. 2.
Bull. N. P. 243.

So where a witness was sworn in a trial at bar in C. B. between the same parties, and on the same issue; and on a second trial he was subpoenaed by the defendant to appear in K. B. and his charges given to him; but he not appearing, persons were admitted to swear what he swore in C. B., for the Court said, That they would presume that he was kept away by the practice of the plaintiff; which supposition was strengthened by his having been produced by the plaintiff on the first trial.

2. OF PRIVATE WRITTEN EVIDENCE.

This is, 1st, Deeds: 2. Other inferior written evidence.

I. OF DEEDS.

1. As to what matters deeds are evidence: 2dly, How they are to be given in evidence to the jury.

1. As to what Matters Deeds are Evidence.

Bull. N. P. 249.

1. "Where any person claims by a deed in the pleadings, he must make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be produced."

Ibid.

For in every contract there must be apt words to shew what rights are transferred, and to whom; and the sense and signification of these words must be expounded by the law; there must therefore be a profert of all solemn contracts: 1. For the security of the subject, that what right is transferred may be adjudged of according to law: 2. Because all allegations in a court of justice must set forth the thing demanded; and the thing there demanded cannot be set forth without shewing the instrument upon which the demand arises.

Bull. N. P. 249.

"But where a man shews a good title in himself under the deed, every thing collateral shall be intended, whether it be shewn or not; and that matter is collateral which does not enter into the essence or being of a title, but arises *aliunde*; so that there may be a derivation of title without it."

Sir Humphry
Ferre v. Wignall,
Cro. Eliz. 400.

As where in trespass the defendant justified taking the beast in question as an heriot, as servant to John Ardern, who had been enfeoffed of the lands by St. Leger, and shewed the custom of so taking: it was demurred for cause, That the defendant entitled John Ardern as a purchaser by enfeoffment, and shewed not the attornment of the tenant; but it was over-ruled, for the Court said, That it should be intended.

Co. Litt. 267.
10 Co. 92.

Neither can *privies in estate* take any advantage of a deed without shewing it; as if there be tenant for life remainder in fee, and there be a release to him in remainder, tenant for life cannot take

the advantage of it without shewing the deed; for since the right lies merely by the deed, to say that a person is released without shewing the deed, would not be a good plea.

2. "But as to the cases in which a deed is necessary in evidence, a distinction is to be observed between *things lying in grant*, and *things lying in livery*; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed must be shewn." Bull. N. P. 250.

As to things that lie in livery, a man may plead that J. S. enfeoffed him, without saying "by indenture," and yet give the indenture in evidence, because the feoffment is *made by the livery*, and the indenture is only evidence of such feoffment; but if a man plead that J. S. enfeoffed him by deed, it may reasonably be doubted whether he can give a parol feoffment in evidence, because he has bound himself up to a feoffment by deed. 2 Roll. Ab. 682. Co. Litt. 281.

And though since the statute of frauds, the ceremony of livery only is not sufficient to pass an estate of freehold or term of years, yet there must be a deed or note in writing, yet it is not necessary to set out such conveyance in the pleadings, for they are as they were formerly "*feoffavit & demisit*." Bull. N. P. 251.

2. As in things that lie in grant.

These are incorporeal rights, as fairs, markets, advowsons, and rights to land where the owner is out of possession; and as they cannot visibly be delivered over, therefore they must pass by the best sort of conveyance that holds the second place in point of solemnity; that is, by grant under the hand and seal of the party. Co. Litt. 225.

If a person claims any thing lying in grant, he must shew his deeds, or otherwise he must prescribe in the thing he pretends to, and the prescription being supposed immemorial, supplies the place of a grant. Dr. Leyfield's case, 10 Co. 92.

3. He that has a *particular estate by agreement of the parties*, must shew not only his own conveyance, but the deeds paramount; for there can be no title made to a thing lying in agreement but by shewing such agreement up to the first original grant. 10 Co. 93.2.

But where a person claims any *particular estate by act of law*, he may make claim without shewing the deeds; as tenant in dower, or by elegit, or guardian in chivalry, may claim an estate in a thing lying in grant, without shewing the deed; for where the law creates an estate, and does not give the particular tenant the property of the deeds, it must allow the estate to be demanded without them. 10 Co. 94.

So he may plead a *condition without shewing the deed*, because he claims an estate by act of law, and therefore is not estopped by the act of livery; and may claim an estate defeated by the condition without deed. Co. Litt. 225.

But a *tenant by the courtesy*, though he is in by operation of law, cannot claim any estate lying in grant without the deed, because he has the property in and the custody of the deeds in right of his wife; which property cannot be divested out of him during the continuance of his estate. 10 Co. 94.

So

Ibid.

Bull. N. P. 252.

So also he cannot defeat an estate of freehold without shewing the deed, for the act of livery is an estoppel that runs with the land, and bars all people to claim it by virtue of any condition, without the condition appear in the deed; and since he has the custody of the deed, he must shew it.

Ibid.

But where a man has not the custody of the deed, as where the mortgagee makes a lease, and after the mortgagor re-enters; in which case the lessee has not the custody of the deed: in that case he is not compelled to shew it.

Co. Litt. 226.

Bull. N. P. 253.

4. As no party shall take advantage of his own negligence in not keeping his deeds, which in all cases ought to be fairly produced to the Court, so his adversary shall not take any advantage of his violent detaining them; for the one, by the violent taking away of the deeds, gives to the other a just excuse for not having them at command, and no man can take advantage of his own injury; and therefore it is a good plea for one party to say, "*That the other entered, and took away the chest in which the deeds were.*"

2. Of giving Deeds in Evidence to the Jury.

Bull. N. P. 254.

As to this the general rule is, 1. That the deed itself must be given in evidence, and 2. That it must be proved by one witness at the least: for *delivery* being essential to a deed, it must be proved; and it is not sufficient only to prove the party's handwriting subscribed.

Johnson v. Mas-
son, Espin. N. P.
Caf. 89.

The courts have adhered so strictly to this rule, that they will not suffer a party to acknowledge his deed in court.

Powell v.
Blackett,
Espin. N. P.
Caf. 97.

But it is not necessary that the subscribing witness should have actually seen the party sign the deed, it is sufficient if he acknowledged to the witness that he signed it.

But there are some exceptions to this part of the rule, as to the production of the original.

1 Mod. 94.

1. If after notice the opposite party refuse to produce it, a *copy will be good evidence*: but such copy ought to be proved by a witness who has compared it with the original, for otherwise there is no proof that it is a true copy.

1 Keb. 117.

2. For the same reason where a will remains in Chancery, by the order of the Court, a copy may be given in evidence, because the original is not in the power of the party.

10 Co. 92.
Thurston v. De-
lahay, Hereford
Ass. 1744,
Bull. N. P. 254.
Pritchard v. Sym-
monds, Hereford
1744. Bartlett
v. Gawler, Tr.
14 G. 2. B. R.
Bull. N. P. 254.
Styke, 205.

3. So where it is proved that the deed itself is lost by fire, a copy may be given in evidence; but perhaps in such case, if it came out in evidence that there were two parts executed, and the loss of one only was proved, a copy would not be evidence: so if it were proved that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought not to be read, even though the defendant has sworn in an answer in Chancery that he had not got the original.

Rex v. Cullerton,
6 T. Rep. 256.

"Where a party offers parol evidence of a written instrument, he must shew due diligence to get at the original."

For where, to establish the settlement of a pauper, it was proved that

that he had been bound apprentice by indenture of two parts; one of which had been lost, but the other part had come to the hands of a Miss Taylor, inquiry had been made from her respecting it, and she had said, she could not find it, nor did she know where it was; but Miss Taylor was not subpoenaed as a witness: it was held, That parol evidence should not be admitted to prove the contents of the indenture.

And in these cases, if the party has no copy he may produce an abstract; nay, give parol evidence of the contents: and where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence, without being proved to be true, because in such case it may be impossible to give better evidence.

A recital of a lease in a deed of release is good evidence of such lease against the releasor, and those that claim under him; but as to others it is not, without proving there was such a deed, and that it was lost or destroyed.

Ford v. Gray,
Salk 285.
4 Rel.

2. As to the second part of the rule, that *the deed must be proved by one witness* at least, it is to be observed,

1. That it was held in this case that where a deed is in the hands of the opposite party, and he has notice to produce it, and does so, *it is to be admitted in evidence without proof of the execution of it*; for being in the hands of the opposite party, it cannot be known who the subscribing witnesses were, and so the party cannot be prepared to prove it.

Rex v. Middle-
zoy,
2 T. Rep. 41.

The law was for some time so held, but this case has been overruled; and now, though a deed is in the hands of the opposite party, and produced in consequence of notice given, it must still be proved by the subscribing witness.

Gordon v.
Secretan,
8 East, 548.

See exception *ante*, ch. of Debt. The law as to the execution of bonds treated of there, applying to all cases of deeds, as to which here it may be sufficient to observe in the words of Sir J. Mansfield C. J. 1 Taunt. 366. "The law in this particular has been much relaxed; the increased commerce of the country and the number of persons who every year go out of it, first rendered it necessary to admit secondary evidence, where witnesses are abroad. The dispensation was next extended to the case of witnesses who were not to be found. The balance of convenience is in favour of the extension."

2. But to this rule are exceptions.

1. As where a witness to a deed, being subpoenaed, did not appear; but to prove it the party's deed, they proved an indorsement, reciting a proviso within, that if he paid such a sum the deed should be void; and acknowledging that the sum was not paid, and by the indorsement he expressly owned it to be his deed: upon this it was admitted to be read.

Case K. B. 500.

So where there has been an assignment by deed, it is sufficient to prove the assignment by the subscribing witness, without calling the witness to the original deed; for the assignment having adopted the deed in all its parts, they become as one deed.

Nash v. Turner,
Espin. N. P.
Cal. 217.

Glascock v. Sir
Wm. Warren,
Hil. 12 G. 3.
Bull. N. P. 255.

Anon.
Salk. 287.

Griffith v.
Moore,
Bull. N. P. 255.

Bull. N. P. 255.

5 Co. 54.
Stile. 445.
1 Keb. 117.
Salk. 280.

1 Sid. 269.

Goodrights ex
dim. Walling-
ford v. Weston.
Per Willes, C. J.
Abingdon Sum.
Aff. 1754, MSS.
2 Roll. Ab. 132.
Bull. N. P. 256.

2. It has been holden, That a deed to lead the uses of a fine or recovery may be read without proof of its being executed; the reason of which seems to be, that by the fine being levied, it appears the parties intended to convey the land to some use or other, and therefore the law will admit of slight proof to shew what use was intended; since the slightest proof without other to contradict it, will turn the presumption on that side: and therefore though the counterpart of a deed be not evidence in other cases, yet it has been holden so in the case of a fine and recovery; however, in a case reserved from Hereford assizes by Mr. Justice Fortescue, all the judges were of opinion, That such a deed to lead the uses of a fine must be proved; and therefore it seems as if the above case and that in *Salkeld* were not law.

3. It has been said, That a deed of bargain and sale inrolled, may be given in evidence without proving the execution of it, because the deed by law requires inrollment, and therefore the inrollment shall be evidence of the lawful execution of it; but that where a deed needs no inrollment, there, though such deed be inrolled, the execution of it must be proved; because since the officer is not intrusted by the law to inroll such deeds, the inrollment will be no evidence of the execution, and the cases in the margin are cited in support of the doctrine: however, it is said by Just. Buller (N. P. 255.), that the law may well be doubted notwithstanding that deeds of bargain and sale inrolled have frequently been given in evidence at *Nisi Prius* without being proved; and in support of the practice the case of *Smartle* against *Williams*, in *Salkeld*, is relied on; but that case is wrongly reported; for it appears by 3 *Lev.* 387. that the acknowledgment was by the bargainor, and so it is stated in *Salkeld*, MSS.; besides, it appears from both the books that it was only a term that passed, and so it was no inrollment within the statute.

4. A deed may be given in evidence on a rule of court by consent, without being proved, for the consent of the parties is conclusive evidence, as the jury are only to try those matters wherein they differ.

5. The deed of a corporation need only be proved to be under the corporation-seal; and there is no occasion for signing or attestation, proof of the seal is sufficient. *Vid. Doe* c. d. *Woodmas* v. *Mason*, *Esplin*. N. P. Cas. 53.

6. Though a deed of feoffment be proved to be duly registered, yet it is not sufficient to convey a right, unless livery of seisin be likewise proved; however, where the deed is proved, and possession has always gone according to it, livery shall be presumed; but if possession has not gone along with the deed, the livery must be proved; for since livery is to give possession on the deed, where there is no possession, the presumption is, that there was no livery, and consequently it must be proved, to encounter the presumption: but if the jury find a deed of feoffment, and that possession has gone along with the deed, yet, unless they expressly find a livery, the Court cannot adjudge it a good conveyance; for they are only judges of what is law, and have nothing to do with any probability.

probability of fact; therefore they cannot conclude that there was a lawful conveyance, unless the jury find a delivery of the fee.

7. Where a deed is by law to be inrolled, as deeds under stat. 27 H. 8. c. 6.; so of dutchy leases with the auditor: in such cases the indorsement by the proper officer in the usual manner, on the back or in the margin, is always admitted as good evidence of the inrollment.

Kinnerley,
v. Orpe,
Doug. 56.

8. Deeds of thirty years standing may be given in evidence, without proof of their execution. In what cases *vid. ante*.

Thompson
v. Miles,
Elpin. N. P.
Caf. 184.

9. Where a party to prove a title, produce a number of old deeds; it was ruled in this case by Lord *Kenyon*, that he should not be obliged to prove such deeds by the subscribing witnesses.

10. Where a deed has been executed under a power of attorney, the power of attorney must be produced.

Johnson v.
Mason,
Aute.

2. OF INFERIOR WRITTEN EVIDENCE.

1. "The books of third persons are good evidence as to any transaction to which they immediately refer."

In an action concerning tithes, the books of a rector or vicar who was dead, was admitted as good evidence; for as he had no interest but for his life, it could not be presumed that he would make any entries that were false, merely for the benefit of his successor, who might be an utter stranger to him; and therefore not like the case of the owner of an estate, who might be presumed to have a partiality for his own family, who were to succeed him.

Per Yates, Just.
Timmins v.
Waugh, Worcester Lent Ass.
1765, MSS.

So where an estate was limited to two persons for life, with leasing powers, reserving the ancient rent with remainder in tail; and among the muniments of the estate handed down to the first tenant in tail (the tenants for lives being dead,) was found a paper, in the form of a letter, from a person who appeared to be the steward at the time, mentioning the rents then reserved on the estate, addressed to the first tenant for life, and indorsed by him in these words, "Jan. 25, 1728-9, from *Hobart*, a particular of my estate in *Cornwall*." This having been handed down among the muniments of the estate, was held to be evidence, (on an ejectment to break a lease as not made within the power,) of the ancient rent, when it was made. So also were entries found in the book of the first tenant for life, of the amount of the rent, evidence of the amount of the rent.

Doe ex d Brune
v. Rawlings,
7 East, 279.

So in this case, where the question was if the mortgage-money was really paid? a scrivener's book of accounts (the scrivener being dead) was holden to be good evidence of payment.

Smartle v. Williams, cited per Lord Hardwicke in Montgomery v. Turner, 1751, Bull. N. P. 283.
Warren ex dim. Webb v. Greenville,
2 Stra. 1129.

So where a question arose respecting the surrender of a tenant for life, which was necessary in order to establish a recovery which had been suffered: to prove that fact, the debt-book of a Mr. *Edwards*, an attorney at *Bristol*, who was then dead, was offered in evidence; in which book was a charge made by him of 3*l.* for suffering the recovery in question; and two articles of it were for drawing the surrender in question twenty shillings, and engrossing two parts, twenty shillings more; and it appeared from the book that this bill had been paid: it was held to be admissible and good evidence.

Barry v.
Bebington,
4 T. Rep. 514.

So in an action of trespass, the issue was on the foil and freehold of the defendant. At the trial, the plaintiff, who made title under Lord *Barrymore*, offered in evidence sworn entries in a book in the hand-writing of one *Ashley*, who had been steward to Lord *Barrymore* many years back, and who was then dead. The book was a common day-book kept by *Ashley*, containing different matters concerning his different employers, and the entries in question were memoranda of receipts of money by *Ashley*, from different persons by name, for trespasses committed on the common in question, and paid on Lord *Barrymore's* account. The first was in 1739, the last in 1785. This evidence was refused at the trial, and the defendant had a verdict. On a motion for a new trial, the Court were of opinion, that it was admissible evidence, for the receipts were sufficient evidence in law to charge the steward with the receipt of so much money, and therefore were evidence to prove on what account it was received.

"How far the books of third persons are admissible, received a full consideration in the following case, and the principle upon which the Court received them to be evidence, was that they would be evidence against the parties themselves."

Higham & Ux.
v. Ridgeway,
10 East, 109.

Therefore where the question was as to the time when a child was born, an entry in the books of the man-midwife who attended his mother at the time of her delivery, mentioning the day, his charge for medicines and attendance, and marking it as paid, was held to be good and admissible evidence of the fact.

2. "So the party's own books are good evidence against him."

3 May 1738,
Bull. N. P. 282.

In an issue out of Chancery, to try whether eight parcels of *Hudson's Bay* stock, bought in the name of Mr. *Lake*, were in trust for Sir *Stephen Evans*: the plaintiffs, his assignees, shewed first, that there was no entry in the books of Mr. *Lake* relating to this transaction: 2dly, Six of the receipts were in the hands of Sir *Stephen Evans*; that there was a reference on the back of them by *Jeremy Thomas* (Sir *Stephen's* book-keeper) to the book *B. B.* of Sir *Stephen Evans*: 3dly, *Jeremy Thomas* being proved to be dead, the question was, Whether the books of Sir *Stephen Evans* (referred to, in which was an entry of the payment of the money,) should be read? and the Court of *King's Bench* at a trial at bar, admitted it not only as to the six shares, but also as to the other two in the hands of Mr. *Biby Lake*, the son of Mr. *Lake*.

In the case of *Cooper v. Marsden*, *Esplin. Ca. N. P.* 1. Lord *Kenyon* held that entries in the books of merchants, bankers, &c. could only be proved by the clerk who made them; and that no other evidence was admissible, though such clerk was abroad, because he might give some material evidence independent of the mere entry from having some acquaintance with the dealings upon which the entry was founded.

Sir J. Bridgeman v. Jennings,
1 Ld. Raym.
734.

So if *I. S.* seized of two manors, *A.* and *B.* and he cause a survey to be taken of *B.*, and afterwards conveys it to *J. N.*, and afterwards disputes arise concerning the boundaries of the two manors, this survey is good evidence: aliter if the two manors had not been in the same hands when the survey was made.

But

But wherever private books are offered in evidence, they must be very clearly authenticated.

For where certain books from 1586 to 1695 preserved in the archives of the dean and chapter of *Exeter*, were offered in evidence to prove the receipt and payment of rents; their authenticity cannot be established by proving, that for the last sixty years the receiver of the estates kept their books, and made the entries in the same way. But if there is any internal evidence to authenticate them, they are admissible evidence.

Doe ex d. Webber and Dean and Chapter of Exeter v. Lord Geo Thynne, 10 East, 206.

3. "A receipt is *prima facie* and presumptive evidence to charge the party with so much money received; but it is *not conclusive evidence*."

For where the defendant, together with one *Avarne*, signed a receipt acknowledging to have received the sum of 575*l.* being the consideration money of an annuity: the annuity afterwards being void, and an action brought for the money, it was held, That the defendant might shew that he was only the surety, and had not received any part of the consideration-money, notwithstanding the receipt; and having done so, he had judgment.

Stratton v. Rastal, 2 Term Rep. 366. and *ca.* *ibid.*

But if a receipt in full be given with full knowledge of all the circumstances then depending between the parties, it is a complete bar to the action: *aliter* when given without such knowledge.

Bristow v. Eastman, 4 Espin. N. P. Caf. 173.

And where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given to refresh his memory.

Rambert v. Cohen, 4 Esp. N. P. Caf. 213.

4. To prove property in a cargo, in an action on a policy of insurance, the plaintiff produced a bill of parcels of one *Gardiner* at *Peterburgh*, with his receipt to it, and proved his hand: it was objected, That this was no evidence against the insurers; but the Chief Justice (*Lee*) admitted it.

Ruffel v. Boheme, 2 Stra. 1127.

So to prove an interest in the insured, the production of the bill of lading, and the evidence of the captain of the ship that he had the goods on board, was held to be sufficient.

M^r Andrew v. Bell, 4 Espin. N. P. Caf. 373.

To prove part of a pedigree, that is which of two members of a family was the elder, a cancelled will found among the papers of the person last seized, and which purported to be the will of his ancestor, was held to be good evidence of the fact.

Doe ex d. Johnson v. Pembroke, 11 East, 504.

5. "The *Gazette* is good evidence of all acts of state, and in general, sufficient notice as to matters published in it."

Therefore in an information against the defendant for publishing seditious writings, in which was an averment that divers addresses had been presented from different parts of the kingdom, expressive of their loyalty and attachment to his majesty; the *Gazette* was held to be good evidence of that averment.

Rex v. Holt, 5 T. Rep. 436.

But it is not sufficient evidence to prove an officer possessed of the commission to which he appears to be gazetted; but on an information against him for an offence arising out of his conduct in any commission, it is sufficient to shew that he acted as such officer.

Rex v. Gardner, 2 Campb. 513.

But where in an action for goods sold and delivered against three partners, one let judgment go by default, and two of them

Gowram v. Hope & alr. Sitt. at West. after Mic. set 1792, MSS.

set up a defence, That the partnership had been dissolved before the goods were furnished which had been delivered to the third, and that notice of the dissolution of the partnership had been inserted in the *London Gazette*, *Ld. Kenyon* said, That that alone was not sufficient, but that particular notice by letter or message should be given beside to all persons who had any transactions with the firm.

Godfrey v. Turnbull & alt. Espin.
N. P. Cal. 379.
Per Buller, Just.
5 T. Rep. 446.
Thellusson v. Culling, 4 Espin.
N. P. Cal. 266.

But as to persons who have had no previous dealings with the partnership, it is unquestionably good evidence.

"So other matters printed by the King's Printer are good evidence; as the Articles of War."

To ascertain the date of a declaration of war, the declaration from the ambassador of the court abroad, transmitted by him to the Secretary of State's office, is evidence.

Richardson v. Anderson,
1 Campb. 65.

6. To prove the acts of state of a foreign government, copies should be produced examined by the ancient archives abroad.

7. Notes of hand and bills of exchange also rank under this head; of which I have already treated at length.

Biggs v. Lawrence,
2 T. Rep. 454.

8. A letter from an agent acknowledging the receipt of goods, is good evidence against the buyer.

Note; It is however to be observed in general, that most instruments, whether of a public or private nature, now usually given in evidence, are by several statutes required to be stamped; without which they cannot be admitted.

As to this it has been resolved,

Rex v. Reeks,
2 Stra. 716.

1. "That each instrument to which a stamp is required, must, if given in evidence, be properly stamped."

For where in a *quo warranto* for usurping the office of burghs, the defendant's admission was produced, and it appeared that five persons were included in one admission which was stamped, but four other blank papers regularly stamped were annexed to it: this was adjudged to be bad, for that each admission should be distinct and properly stamped.

Allen v. Thomas,
Sum. Ass. Maidstone, 1791.
Coram Gould,
Just. MSS.

2. "As the revenue is the object of the stamp-duties, though every distinct instrument has a distinct stamp, it has been held, that if the amount of the duty is paid, the Court will admit an instrument to be given in evidence, though not stamped with the proper stamp which such instrument requires."

For where in *assumpsit* for use and occupation, the defendant offered in evidence a demise by deed of the premises in question, which would have nonsuited the plaintiff under stat. 11 Geo. 2. c. 19: on being produced, it was not stamped with the stamp required for leases; but was on an agreement-stamp: for this it was objected to; but it was answered, That the stamp for leases was a six shilling stamp, and that for agreements of the same amount; and therefore the amount of the stamp-duties being satisfied, that that was sufficient: the Judge was of that opinion, and admitted it to be given in evidence.

Robinson v. Drybrough,
6 T. Rep. 317.

"But the law is now otherwise, and every instrument must have the appropriate stamp, or it is inadmissible in evidence."

But if the stamp required for any instrument consists of many sums laid on by different acts of parliament at different times, such only

only should be put to the instrument offered in evidence; a stamp *ad valorem* will not be sufficient.

In fact as the law now stands it should seem that the value of the stamps, or whether it belongs to instruments of the same nature as that upon which the action is brought, makes no difference. The appropriate stamp and accurate sum must be on every instrument offered in evidence.

Though where the whole of the stamp duty is laid on by the act of parliament, a stamp *ad valorem* is sufficient.

But in this case it was ruled, that a receipt for the price of an horse containing a warranty of soundness might be read in evidence, to prove the warranty, without an agreement stamp, the proper stamp for a receipt being on it.

3. "Though parol evidence might be sufficient to prove any matter or agreement, yet if the party will reduce it into writing it cannot be given in evidence, unless it is stamped."

For where a written agreement in these words, "*A. doth let and sell to B. for the term of three years,*" was offered in evidence in an action of *assumpsit* on a special agreement, the defendant objected to its being read, because it was a lease and not stamped; for the plaintiff it was said, that it was only a memorandum of a parol lease, which being for three years only, is good as such; and the statute in using the words "indenture, lease, or deed-poll," meant only deeds: but it was holden, That though a parol lease for three years is good, yet if a man through caution will reduce it into writing, he must pay for the stamp, otherwise the court are inhibited from receiving it in evidence.

So where to prove the dissolution of a partnership, the copy of the advertisement inserted in the *Gazette*, giving notice of the parties having come to agreement to dissolve partnership, was offered in evidence; on an objection being taken, that it was an agreement, and ought to have been stamped, it was answered, that it was not an agreement, but merely given in evidence to shew that the parties had in fact dissolved partnership. But Lord Kenyon held, that every paper to be given in evidence in proof of any agreement ought to be stamped; and therefore rejected it.

And wherever an agreement is entered into in writing, but not stamped, the party is not at liberty to consider the agreement as parol. But he is bound to give the writing in evidence, and if it is on unstamped paper, he cannot give it in evidence.

But where there have been two parts and one has been stamped, and that one in the possession of the party against whom the action is brought, if the party suing gives notice to produce it, and the defendant refuses to do so, secondary evidence, as parol or a copy may be given in evidence.

4. "By stat. 1 Ann. stat. 2. ch. 22. s. 2. "Persons are forbidden to write again on a paper before stamped and written on, unless such paper shall be re-stamped, or to erase or change the name, or affix another piece to a stamp used before, under a penalty," &c. &c.

Under this statute it has been held,

That where a person gave a letter of attorney to two persons therein

Farr v. Price,
1 East, 55.

Aitcheson v.
Sharland, Espin.
N. P. Caf. 293.
Shrine v.
Clonore,
2 Campb. 407.

Proffer v.
Phillips,
Hereford Sum.
Aff. 1765.
Coram Perrott,
Baron:
Bull. N. P. 269.

May v. Smith.
Espin. N. P. Caf.
283.

Brewer v.
Palmer, 3 Esp.
N. P. Caf. 212.

Garnons v. Swift,
1 Taunt. 507.

Stonehouse
v. Babb,
5 Burr. 2679.

therein named, to receive money for him in *Newfoundland*; that they did not receive it, but applied merely for payment; upon which the person erased the names of the persons so before appointed attorneys, and put another in their stead to receive the same money and from the same person: it was held that this was within the penalty of the statute.

*Rex v. Bishop
of Chester,
1 Stra. 625.
Bowman v.
Nichol. Espin.
N. P. Cal. 81.*

But when the penalty is paid, and it is then stamped, it may be given in evidence.

So that any alteration requires a stamp where in *assumpsit* on a bill of exchange, the bill was drawn the 2d of *September*, payable 21 days after sight; while the bill remained in the hands of the drawer, it was altered with the consent of the acceptor, and made payable 51 days after sight. On the 30th of *September*, when it was over-due according to its original tenure and date, it was again altered and made payable at 21 days, after which it was negotiated, and the action brought on it; but the old stamp still remained, nor was any new stamp added. Lord *Kenyon* held, that every alteration made it a new instrument, and a new stamp necessary, and therefore nonsuited the plaintiff.

“ This alteration must be however in a material part, and varying the original instrument as intended to be executed: for if the instrument has been made wrong by mistake, it may be rectified without a new stamp being necessary.”

*Cole v. Parkin,
12 East, 471.*

As where the register of a ship was by mistake mentioned as made at *Guernsey*, which in fact was at *Weymouth*, and was afterwards altered to that, it was held that a new stamp was not required.

*Kershaw v. Cox,
3 Esp. N. P. Cal.
246.*

So where a bill of exchange, intended to be negotiable, was drawn, but the words *or order* were omitted, it was held that a subsequent addition of these words did not make a new stamp necessary.

5. By stat. 23 Geo. 3. c. 58. “ All agreements in writing, whether the writing be only evidence of the contract, or obligatory, upon the parties from its being a written instrument, are required to be stamped; but there are the following exceptions, *viz.* memoranda or agreements for leases at a rack rent of any messuage under the yearly value of 5*l.*: for the hire of any labourer, artificer, manufacturer, or menial servant, any memorandum, letter, or agreement, for or relating to the sale of goods, wares, or merchandize, where the matter of memorandum or agreement shall not exceed 20*l.*; or any memorandum or agreement made in *Scotland*, if stamped with the duty required there.”

*Mackenzie
v. Banks,
5 Term Rep.
176.*

In this case, which was *assumpsit* on the defendant's undertaking to pay the debt of his mother, who was in trade, which he conducted for her, but had no share in the profits. The undertaking was by a letter which was not stamped. It was adjudged, that as this letter was written in the fair course of business, on account of the trade, and by which he bound himself to another tradesman, was within the exceptions of the statute, and did not require a stamp.

*Venning v.
Leckery,
13 East, 7.*

So where the defendant agreed by writing to take a half share of goods, half profit and loss, and to advance half the money to buy

my goods, this was held *to relate to the sale of goods*, and to require no stamp.

6. "As to how stamped copies may be given in evidence."

There are two sorts of copies of proceedings; a *close copy* which might be given in evidence in another court, and *office copies* which are equivalent to the record itself when made use of in the same court in the same cause; the office-copy is fixed to a certain number of words in a sheet, in order to ascertain the officer's fees; but copies to be given in evidence might be written as close as the writer pleased; the stamp-acts mean to prevent any frauds in the office-copies by the parties compounding with the officers for their fees, and then writing a more than usual number of words in them, but did not mean to fix close copies to any number of words in a sheet.

Den v. Fulford,
Per Ld. Mansfield,
2 Burr. 1181.

And note; the Court will not allow a party to recover on an instrument made abroad, which by the laws of that country requires a stamp, unless it is stamped with the appropriate stamp of the country.

Alves v.
Hodgson,
7 T. Rep. 254.

Several determinations have taken place respecting stamps, which often occur *ad nifi prius*, and are reducible to no certain head; as, /

1. Where an agreement was entered into by several, for a subscription to a common fund; namely, making a wet dock at Bristol; and the action was brought by the treasurer against one of several subscribers for his share; and objection was taken, that there was but one stamp; but held, that though the agreement was several as to each subscriber, one stamp only was requisite: and a case there cited, of *Baker v. Jardine*, that where several seamen by one instrument assigned their prize-money, that one stamp was sufficient, their several shares being payable out of one fund.

Davis v.
Williams,
13 East, 132.

2. Schedules of appraisement are required to be stamped by stat. 46 G. 3. c. 43. And where nothing was referred to appraisers except the mere value of goods and of repairs on a farm, an appraisement stamp on a written valuation was held to be sufficient under that statute, and an award stamp not necessary.

Leeds v. Barrow,
12 East, 1.

2. OF THE RULES ADOPTED BY THE COURT, UNDER WHICH EVIDENCE IS TO BE GIVEN.

1. "The first rule of evidence is, That in every issue the affirmative is to be proved." Bull. N.P. 298.

This rule is founded on the nature of things, as a negative *Ibid.* cannot regularly be proved, and therefore it is sufficient to deny what is affirmed till it be proved; but when the affirmative is proved, the other party may then contest it by opposite proofs; for that is not properly the proof of a negative, but of a proposition totally inconsistent with what is affirmed.

As in trespass, if the defendant be charged with a trespass generally, he need only a general denial of the fact; but if the fact be proved, he may then prove another proposition inconsistent with the charge, as that he was at another place at the time, or the like.

"So

- "So where a negative averment can be proved by affirmative evidence, and the negative averment is a material one in the declaration, it must be proved."
- Williams v. East India Company*, 3 East, 192. As in case for putting on board a ship a certain inflammable substance called roghan, which had oozed out and set the ship on fire, and the declaration averred "that the defendant had not given due or sufficient notice to the persons on board the ship of its nature, so that they should have taken more care of it:" It was adjudged, that the negative averment of *want of notice* should be proved by the plaintiff, as he could have proved affirmatively what passed at the time of the delivery of the article:
- "But to this rule is an exception of such cases, where the law presumes the affirmative; in which case the other party is put on proof to impeach it."
- Bull. N. P. 298.* As the law presumes that every man does his duty until the contrary is proved; therefore in an information against Lord *Halsbury*, for refusing to deliver up the rolls of the auditor of the exchequer, the Court put the plaintiff upon proving that he had not delivered them up.
- In the case of *Williams v. East India Company*, last cited, Lord *Ellenborough* lays down the rule to be, "that where any act is to be done, the not doing of which would be a criminal neglect of duty; the law presumes the affirmative, and throws the burthen of proving the negative on the other side."
- Monk v. Butler*, 2 Roll. Rep. 83. As in a suit for tithes in the Exchequer, the defendant pleaded that the plaintiff had not read the 39 articles. The Court put the defendant to prove that the parson had not, for the law would not presume that he had not done so, as otherwise he would forfeit his benefice.
- Wilson v. Hodges*, 2 East, 312. And in this case, where the issue was whether the principal in a bond was living or dead. It was adjudged that the party alleging the death was bound to begin and to prove it.
- Ibid.* 2. "A second general rule is, That no evidence need be given of what is agreed by the pleadings; for the jury are only to try the matter in issue between the parties, so that nothing else is properly before them."
- Dyer*, 183.c. 58. As in *replevin*, the defendant avowed the taking the cattle in the *locus in quo*, as parcel of his manor of *K.*: the plaintiff replied, That it was parcel of the manor of *K.*, and made title to it, and traversed that the manor of *K.* was the freehold of the defendant. At the trial he was not admitted to prove that *K.* was no manor, for that was admitted in the pleadings, and the issue was to whom it belonged.
- Bull. N. P. 298.* "So the jury cannot find any thing against that which the parties have affirmed and admitted of record, though the truth be contrary."
- Anon.* As in *trespass* for throwing down and carrying away stalls: Patch. 4 Ann. As to all the trespasss, except the throwing down, the defendants pleaded not guilty; and as to the throwing down, they pleaded a special justification, and therein justified both the throwing down and the carrying away: on issue joined, the judge at the assizes would not try whether the defendants were guilty or not of the
- K. B. Salk.*
MSS. Bull. N. P.
298.
This case was before the stat. of Ann. which

be carrying away, because they had confessed it by their justification : and on a motion for a new trial, the Court held the judge's directions to be right ; for the jury could never find the defendants to be not guilty of that which they had confessed on the record, though in another issue.

enables the defendants to plead double.

" But there may be a matter on the face of the pleadings which may be an estoppel to the party to aver against it ; but which nevertheless the jury shall not be concluded by."

As in debt on a bond of intestates by the administrator, bearing date 4th of April 1572, the defendant pleaded that the intestate was dead before the date of the bond, and *sic non est factum* : on issue joined, the jury found that the bond was delivered 30th of July 1571, and that the intestate was then living : the Court held, That though it was an estoppel as between the parties to aver against the deed, yet it was none as to the jury, who were sworn to find the truth ; and the plaintiff had judgment. *Note* : It was agreed in this case, that the date of the deed was not of the substance of it ; for if there be no date, or a false or impossible date, as 30th of February (*ex gr.*), yet that the deed was good.

Goddard's case, 2 Co. Rep. 4. 6.

3. " A third general rule of evidence is, That wherever a man cannot have advantage of any special matter, by pleading that he may give it in evidence under the general issue."

Co. Litt. 283.

As where in debt on a bond and plea of bankruptcy, the plaintiff offered the condition of the bond in evidence, to shew that the debt was not barred by the bankruptcy (it being a bond not then due or payable) ; this was objected to, on the ground that the declaration was general ; and the plea admitted the bond as stated, and so not in issue ; and that if the plaintiff intended to have relied on the condition, that he should have pleaded it ; but it was resolved, That the evidence was good and admissible : for pleas of bankruptcy under stat. 5 Geo. 2. always conclude to the country, so that the plaintiff had no opportunity to put the condition on the record ; and therefore, as he could not have advantage of it by pleading, that he should be admitted to give it in evidence.

Alfop v. Price, Dougl. 155.

So no man can justify the killing of another ; therefore he may give the special matter in evidence.

Co. Litt. 283.

So in trover the defendant may give a special justification in evidence, because he cannot plead it : *aliter* in trespass where he can.

1 Jones, 240.

4. " A fourth general rule of evidence is, That the best evidence which the nature of the thing admits and is capable of, must always be given."

Bull. N. P. 298.

The true meaning of this rule is, That no such evidence shall be brought ; that *ex natura rei* supposes still better evidence behind in the parties power or possession ; for such evidence is together insufficient and proves nothing, as it carries a presumption contrary to the intention for which it is produced ; for if no other greater evidence could make for the party, why was not it produced ?

Ibid.

Therefore

Maesters v. Abraham,
Esq. N. P. Caf.
780.
Bull. N. P. 294.

Therefore a letter written by an agent or broker by whom a sale of goods has been made, is not evidence where the broker himself may be called to explain the whole of the transaction.

This rule therefore consists of two parts: 1st, It must be the best evidence: 2. It must be in the party's possession or power; for if not, it is not his default that it is not produced: therefore, where any deed or other instrument *appears to be lost*, without any fault in the party, in such case a copy is good evidence.

1. "Therefore, no parol evidence of any fact or agreement shall be admitted where there is written evidence of such fact; for written evidence speaks for itself, is liable to no perversion or misconstruction, and is more accurate than memory can be, which is uncertain and fallible."

It is therefore the constant practice at *Nisi Prius*, in case a witness mentions any matter which has been reduced into writing, to call for the writing; and if not produced, or not proved to be lost, to reject evidence of such matter or fact.

Jacobs v. Lindsay,
3 East, 460.

But where a book had been kept between the parties containing the several demands of the plaintiff against the defendant, and among other things receipts for money above 40 shillings, which required a stamp, and which were signed by the defendant, but when it was proved by a witness that he read over each article to the defendant, which he admitted to be just, it was decided that the evidence of such witness was sufficient to establish those items, and that he might use the book to refresh his memory, though contended that being in writing, parol evidence could not be admitted. And *per Le Blanc J.* The objection amounts to this, there can be no verbal admission by a party of his having been furnished with certain articles in an account to which he has affixed his signature; but that cannot be supported.

"So upon the same ground, and under the statute of frauds, where any written evidence is produced, parol evidence is never admitted to add to or vary it in any respect."

Meres v. Anfel & alt.
3 Will. 275.

As where in trespass the case was, that the plaintiff being possessed of two closes, called *Millcroft* and *Boreham's Field*, came to an agreement in writing with the defendants, to give them the grafs and hay off *Boreham's Meadow* in exchange for their coppermill, &c. the trespass was committed by the defendant's entering on *Millcroft*: at the trial, parol evidence was admitted, to prove that at the time it was agreed between the parties, that beside *Boreham's Field*, the defendant *was to have the possession and soil of Millcroft*; and the defendant had a verdict: the Court set the verdict aside, such evidence being against law.

Lowfield v. Stoneham,
2 Stra. 1261.

So where upon *plene administravit*, the question was, a man gave "to his brother *John* (the testator) 1000*l.*, and in case of his death, to his wife *Susannah*." *John* survived the testator, and the wife (the defendant) received the legacy; the plaintiff insisted that the 1000*l.* vested absolutely in *John*, and so was assets in her hands: she offered parol evidence, to prove that the testator in extremis declared that he meant only to give the interest of it to his brother for life, and that she should have the principal in case she survived him. Ch. Just. Lee rejected the evidence. — *Vid. Preston v. Merceau,*

Merceau, ante fol. 20. *Gunnis v. Erhart*, ante fol. 12.; and *Finney v. Finney*, 1 *Willf.* 35.: all which cases establish the same point.

However, in this case, in which the question was concerning the settlement of a pauper by purchase of a tenement, the consideration expressed in the deed was 28*l.*; the Court were of opinion, That it was admissible to give evidence, that in point of fact 30*l.* had been paid. Rex v. Inhabitants of Scammonden, 3 T. Rep. 474.

It is a general rule, that the subscribing witness to any instrument must be produced to prove it; but by stat. 26 G. 3. c. 57. §. 58. "deeds executed in the *East Indies*, and attested by witnesses there, may be given in evidence, on proof of the handwriting of the parties and the witnesses."

In some cases however of written evidence, parol evidence is admitted to explain it, as in rule *postea*.

2. Under this ground of the best evidence being always required, copies of any instruments or proceedings are not admissible evidence, except in some particular cases, as the originals are the best evidence. Bull. N. P. 294.

Therefore where in a question on a presentation by a patron to a living, a copy from the bishop's institution-book was held not to be sufficient evidence, for it was not the best evidence that could be had: the presentation under the hand and seal of the patron was better evidence, so was the institution-book itself. Tillard v. Shebbeare, 2 Willf. 366.

So on an indictment against the defendant for setting his house on fire; to prove it insured, an entry in the books of one of the fire insurance offices was offered in evidence; but Lord Kenyon refused to admit it, notice not having been given to produce the original policy, for that was the best evidence. Rex v. Doran, Espin. N. P. Caf. 127.

But in the following cases, copies are admissible.

1st, If the original is proved to be lost or destroyed; for then in fact the copy is the best evidence. Bull. N. P. 294.

2. If the original is proved to be in the hands of the opposite party, in such case a copy may be given in evidence, if such party refuses to produce it upon notice given to do it; or in such case parol evidence may be given of its contents. Ibid. Per L. Mansfield, 4 Burr. 2488.

And where a deed is in the possession of the opposite party, and he, after notice, refuses to produce it, an examined copy is evidence, without proof of the party's execution of it. And though there were two originals, if the party who is proved to have possession of one does not produce it, and the other party has not the other; a copy is, notwithstanding, evidence. Doxon v. Haigh, Espin. N. P. Caf. 782.

It has however been said, that there is a difference in civil and criminal cases or penal actions, as to the necessity that a party is under to produce evidence against himself on his receiving notice to do it; and it has been doubted whether in the latter cases a party is obliged to do it; but however, all distinction as to that is completely over-ruled by the following case:

This case was an information grounded on stat. 7 G. 1. c. 21. for importing tea into *Guernsey*, which had not been first loaded and shipped in *Great Britain*; in the course of the trial the Attorney-General offered to give in evidence copies of letters from the defendant to one *Channon*, who was the witness for the crown respecting Attorney-General v. Le Merchant, Cit. 2 T. Rep. 201.

specting the tea; but which letters were then in the defendant's own possession, *Channon* having become a bankrupt, and by an order of the Chancellor, all his papers having been seized, and delivered up to the defendant; but while they were in the hands of the clerk to the commission, the solicitor for the excise had contrived to get copies of them; at the trial the objection was taken to the reading them, on the ground that this was a criminal prosecution, and that therefore the defendant was not bound to produce this evidence against himself: but the objection was overruled by Baron *Byre*; and on a motion for a new trial, the Court was of the same opinion; so that now there is no distinction in this respect between civil and criminal cases.

Per Buller, Just.
2 T. Rep. 201.

Jory v. Orchard,
2 Bof. & Pull. 39.

But when two copies are made of the same instrument, both signed by the party, and one of them in the possession of the opposite party, the one retained by the party may be given in evidence without notice to produce: as where two copies were made of a demand of a copy of a warrant under which a constable had acted, and both were signed by the party demanding, and one only served; it was held, that he could give the one retained by him, in evidence, without notice to produce the other, they being both originals.

So where an attorney had made two copies of his bill, and signed them both, it was held that in an action for his bill he might give that kept by him in evidence without notice to produce that in the defendant's possession.

Per Holt,
3 Salk. 154.

2. "A second case in which a copy is admissible evidence, is where the original is of a public nature; for wherever the original is of a public nature, and would be evidence if produced, an immediate sworn copy thereof is evidence." As,

Jones v. Randall,
Cowp. 17.
Doug. 572.
in not.

1. A copy of the Journals of the House of Lords respecting the reversal of a decree, was in this case adjudged to be good evidence.

Rex v. Lord G.
Gordon,
Doug. 569.
Ibid. in not.

2. Sworn copies of the entries in the Journals of the House of Commons were produced as evidence on the part of the crown, and admitted.

3. Copies from the transfer books of the East India Company have been held to be good evidence.

Brocas v. Mayor
of London;
1 Stra. 387.

4. Poll-books at an election are of a public nature, and a copy of them shall be evidence: on a suggestion of fraud or rature only shall the originals be produced.

Warrener
v. Giles,
2 Stra. 954.

5. The city books, in which are entered the boundaries of the public markets, are books of a public nature, and copies of them are evidence.

3. "A third case in which copies are evidence, is where they are made so by statute."

Janfon v. Wilfon,
Doug. 244.

1. As under stat. 5 Geo. 2. c. 30. "By which the depositions, proceedings, &c. under commissions of bankrupt are ordered to be recorded, and that copies of them shall be evidence."

3 T. Rep. 712.

2. By stat. 16 Geo. 2. justices of peace are empowered to summon any soldier having a wife or child before, and to cause him to make oath as to his last place of legal settlement; a copy of which affidavit, properly attested, shall be evidence of the place of settlement, stat. 32 Geo. 2.

But where a copy of any document, which is not of itself evidence at common law, is made so by act of parliament, a copy must be produced, and the original is not made evidence by implication.

Burden v. Ricketts,
2 Campb. 120.

4. But copies are to be given in evidence, under the following restrictions:

1. If a copy of a deed or such like instrument is offered in evidence, on the ground of the original being lost, it *must be proved by a witness who compared it with the original*, otherwise there would be no proof of the truth of the copy, or that it had any relation to the deed.

1 Mod. 4.
Vid. ante,
Doxon v. Haigh,
782.

2. Where a copy is in like manner offered in evidence, sufficient probability must be shewn to the Court to satisfy them *that the original was genuine*, as well as *that it was lost*, before the party shall be admitted to read it.

Goodier v. Lake,
1 Atk. 446.

3. "But notwithstanding the rule is thus generally laid down, yet in some instances the Court have admitted an inferior species of evidence."

"This is for the most part where the matter to be proved is not the gravamen or gift of the action, but inducement only. This is chiefly as to the character in which a party sues or is sued. In such case some evidence must be given, as to the parties acting pursuant to the character in which they so sue or are sued."

As in this case, which was an action against an officer of the *Post-office* for interfering in an election, the Court were of opinion, That it was sufficient for the plaintiff to shew the *defendant's acting as such*, without bringing proof of his being appointed by the *Post-office*.

Crew v. Saunders,
2 Stra. 1005.

So in an action by the plaintiff under stat. 27 Geo. 3. c. 26. for the penalties under the *Post-horse* duty, brought by the *farmer*, it was held not necessary for the plaintiff to give in evidence his appointment by the Lords of the *Treasury*, or by the commissioners of the stamp-duty; it was sufficient proof, if the *defendant had accounted with the plaintiff as farmer of the duties, and paid him as such*.

Radford v. Macintosh,
3 Term Rep. 632.

So in an action against the defendant for non-residence, the plaintiff is not called upon to prove admission, institution, and induction, in order to maintain his action; it is sufficient for him to prove *the several acts done by the defendant as parson*; as receiving the tithes, serving the church, &c.

Bevan v. Williams,
3 Term Rep. 635. in not.

So where the action was by an attorney for slanderous words used of him in his profession; it was adjudged not to be necessary to prove him an attorney by his admission on a copy of the roll, but that his having acted as such was sufficient.

Berryman v. Wife,
4 T. Rep. 566.

2d, "In the case of proof of hand-writing where direct evidence cannot be had, by persons who have seen the party write, and have an acquaintance with his character and hand-writing, proof is admissible by persons who have had correspondence with the party." As to which *vid. ante*, page 144, 145.

3d, "So

- 3d, "So if a man destroys what would be evidence against him *in ordium spoliatoris*, inferior evidence is admissible." *Ibid.*
- Leeds v. Cook et Ux.* 4 Esp. N. P. Caf. 256. On which principle, where a letter has been written by the plaintiff to a witness, which defendant wishes to use in evidence, and the witness has had a subpoena *duces tecum*, but has previously delivered the letter to the plaintiff, who refuses to produce it; parol evidence of its contents is admissible.
- Brown v. Watts,* 1 Taunt. 353. 4. Where a bill of exchange has been given for an antecedent debt, and upon production it appears to be on an improper stamp, the original consideration of it, that is, the pre-existing debt, may be resorted to and given in evidence.
- 1 Mod. 283. 5. A fifth general rule of evidence is, "That hearsay is no evidence."
- Bull. N. P.* 294. For as evidence upon oath is only admissible in a court of justice, the first speech being without oath, the oath of another only going to prove that it was said, proves but a bare speaking, and so is of no weight or importance; besides, if the person who spoke the first words be living, what he has been heard to say is not the best evidence.
- 1 Mod. 283. But 1st, Though hearsay be not allowed as direct evidence, yet it may be admitted *in corroboration of a witness's testimony*, to shew that he affirmed the same thing before on other occasions, and that he is still consistent with himself; but this is not evidence in chief; and it is doubtful if it is so in reply.
- Holliday v. Sweeting,* M. 16 G. 3. *Bull. N. P.* 294. But what a party has himself been heard to say respecting the matter in dispute, is good evidence against himself; as in the case of the admission of a debt *ex gr.*; so are conversations which have passed in the hearing of the party respecting the matters in difference, and which were uncontradicted or admitted by him, good evidence; as is the constant practice at *Nisi Prius*.
- North v. Miles,* 1 Campb. 389. As the declarations of a party to a suit are always evidence against him; so what has been said by the bailiff arresting in an action for an escape has been held to be good evidence against the sheriff, for he is the real party on the record.
- Mayor of London v. Long,* 1 Campb. 24. But in an action against a corporation, what has been said by a member of the corporation is not evidence, for he is a party only in his corporate capacity with others.
- Rouse v. Redwood,* Espin. N. P. Caf. 155. But any admission of a demand or confession to that effect made by a defendant, when he is arrested, and is ignorant whether he is bound by law to the payment of a demand or not, is not admissible evidence to charge him.
- Waldridge v. Kennison,* Espin. N. P. Caf. 143. So any admission made by a person under a treaty to compromise a suit, relative to the matters in dispute, is not evidence against him; but any admission of a matter not connected with the merits of the case, as of a hand-writing *ex gr.*, is admissible.
- Bull. N. P.* 294. 2. "Where positive proof is not to be had, the declarations of persons uninterested, and who are then dead, are admissible."
- Per Lord Mansfield,* Cowp. 594. 1. As in questions concerning legitimacy; for it is the practice to admit evidence of what the parents have been heard to say

ay respecting their being married or not; for the presumption arising from cohabitation is strengthened or destroyed by such declarations, which are not to be given in evidence directly, but as reasons for the witnesses belief one way or the other.

2. So hearsay is good evidence in cases of *pedigree*, as to prove who was a man's grandfather; what children he had; when he married, &c., of which it is reasonable to presume that better evidence could not be had; for matters of no direct importance, such as those now mentioned, are only known by reputation; for no written memorial of such matters is usually kept.

Grimwade v. Stephens, in Kent, 1697, Bull. N. P. 294.

As in this case, which was an ejectment; Mr. *Sharp*, who was attorney in this cause, was admitted to give evidence what a Mr. *Worthington* had told him he heard and knew respecting the pedigree of the family, Mr. *Worthington* then being dead.

Duke of Athol v. Ashburnham, E. 14 G. 3. Bull. N. P. 295.

In ejectment, evidence was given that one *James Hasland* (whose title, if living, or that of his issue, would supersede that of the lessor of the plaintiff) was living, a poor labouring man at *Liverpool*, sixty years ago; five witnesses deposed, That they believed he was dead without issue, but knew nothing certain; the plaintiff produced the register of *Waltham*, to shew that one *James Hasland* was buried in 1707; but this name plainly appeared to have been altered from *Harrox*, but by whom or where did not appear; Justice *Clive* left it to the jury to decide, Whether *Hasland* died without issue or not? and the jury found for the plaintiff. On a motion for a new trial, *per Lord Mansfield*—In establishing a title upon a pedigree, where it may be necessary to lay a branch of the family out of the case, it is sufficient to shew that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. Many persons go to the *East* and *West Indies*, and are never heard of again: what is done on such a trial is no injury to the man or his issue, should they ever appear, and claim the estate; it was proper evidence to be left to the jury, and the rule for a new trial was discharged.

Rowe v. Hasland, 1 Black. Rep. 404.

3. "Hearsay is good evidence to prove the death of any relation beyond sea."

Bull. N. P. 294.

As evidence by a person who knew the family, That he had heard in the family that such a person of it had died abroad, and that it was believed in the family: or that such a person died without issue; and such shall be sufficient to entitle the person next in remainder.

Roe ex dim. Ellerbook v. Clerk, Sitt. Hil. 1791, MSS. Coram Lord Kenyon.

4. "Hearsay was formerly admitted as evidence in cases of settlement of paupers."

As where on an appeal the evidence was, That the husband of the pauper told her that he had been hired to one *Smith*, but had been turned away to prevent his gaining a settlement, the Sessions rejected the evidence as mere hearsay and inadmissible: on the case coming before the Court of *King's Bench*, they held clearly, That it ought to have been admitted.

Rex v. Nutley, Bott. Sett. Cal. 334. cit. 3 T. Rep. 715.

Rex v. Greenwich, Bott. Sett. Cas. 281. cit. 3 T. Rep. 716.

Rex v. Holy Trinity, in Wareham, Cuddoc. Sett. Cas. 141.

Rex v. Inhabitants of Chaderton, 2 East, 27.

Rex v. Eriswell.

Rex v. Ferrybridge, 2 East, 54.
Rex v. Abergwilly, 2 East, 63.

Rex v. Erith, 8 East, 539.

Rex v. Hardwick, 11 East, 80.

Skinner v. Lord Bellamont, Worcester, 1744, Bull. N. P. 295.

Bishop of Meath v. Lord Belfield, 1747, Bull. N. P. 295.

The order stated, That the pauper was the daughter of George Wall deceased, who in his lifetime had declared to the witness, that he was settled in Greenwich, by hiring and service to a Captain Saunders; and the order was affirmed on this evidence of the declarations of the father alone: and it was held to be good.

In this case the doctrine above was admitted and established, and the Court went still further, admitting the wife to give evidence of her husband's declarations as to his settlement, *be then being abroad and living.*

But those cases are now over-ruled, and it is now decided, that hearsay evidence of a fact is not to be received upon a question of settlement, though the party who gave the information as to his settlement be dead.

And upon the same principle, an *ex parte* examination in writing on oath of a pauper, taken before a magistrate, as to his settlement, is inadmissible evidence as to his settlement, though the pauper be dead.

Neither are the declarations of the parents of the place where the child was born, evidence.

Where however a party was living in a parish, and a settlement was claimed in it for his son by an appealing parish, and he refused to be examined as a witness, as belonging to the respondent parish,—It was held to be admissible evidence, that he had been heard to say, that he had given above 30*l.* for the purchase of a tenement in the respondent parish, and thereby gained a settlement, which was communicated to the son.

5. "Another case in which hearsay is evidence, is whether *"parcel or not parcel?"* *Vid. ante, Davis v. Pearce, 2 Term Rep. 53. and Holloway v. Raikes, ibid. cit. Ch. of Ejectionment.*

6. "In questions of prescription, hearsay is good evidence in order to prove a general reputation."

As where the issue was on a right of way over the plaintiff's close, the defendant was admitted to give evidence of a conversation between persons not interested, then dead, wherein the right to the way was agreed.

7. "What commences by parol may be transmitted by parol, and that creates a general reputation; in which case hearsay is admissible evidence."

In a *quare impedit*, the plaintiff derived his title from Ld. R. in whom he laid a presentation of one Knight; the bishop set up a title in himself, and traversed the seisin of Lord R.; the plaintiff gave in evidence an entry in the register of the diocese, of the institution of Knight, in which there was a blank in the place where the patron's name is usually inserted, and then offered parol evidence of the general reputation of the country, that Knight was in by the presentation of Lord R.: upon a bill of exceptions this came on in K. B., when the better opinion was, That the evidence was admissible, the register, which was the proper evidence, being silent; for a presentation may be by parol, and what so commences may be transmitted to posterity by parol, and that creates a general reputation.

8. But if a party refers to a third person as to a particular fact, or for information on a particular subject; what such third person says respecting it, is evidence against the person who referred to such third person.

Williams v. Innes,
1 Campb. 364

9. "And on this head it is in general to be observed, that it is no objection to the admission of hearsay evidence, *that the party whose declarations are brought as hearsay evidence, would be himself an inadmissible witness*, provided such declarations at the time were indifferent, and used without reference to the question then before the Court."

As where the question was respecting the boundaries of the parish of *Aston* and the hamlet of *Hammer-smith*, a witness for the defendant proved that an old man, now dead, had told him twenty years before, respecting the boundaries of these parishes, but *the old man had been an inhabitant of the hamlet of Hammer-smith*; this evidence was objected to, because the person who had made the declaration was interested: but Lord *Mansfield* ruled it to be good evidence; for at the time the conversation took place, there was no question or dispute about the matter; nor could it be supposed that a man would hold a conversation, in order to make it evidence twenty years after.

Rex v. Inhabitants of Hammer-smith,
Sitt. West. Hil. 1776, MSS.

5. "Under the last rule it was observed, That parol evidence could in no case be admitted to explain written; but it is a rule of evidence, that where there is a doubt on the face of the words respecting the matters to which they refer, in such case parol evidence may be admitted to ascertain such facts."

Bull N. P. 297.

This *ambiguitas*, or doubt of the construction, is divided by Lord *Bacon* into *ambiguitas latens* & *patens*.

Ambiguitas latens is that which seems certain, and without doubt for any thing that appears on the face of the deed or instrument; but there is some collateral matter out of the deed or instrument which creates the ambiguity.

"Where the ambiguity is of this nature, parol evidence is admissible, for the instrument itself being certain, but the doubt arising from something extrinsic, extrinsic matter should be admitted, particularly as it fortifies and gives effect to the written evidence."

"But where any implication or construction of law arises from any written evidence whatever, parol evidence may be admitted to explain that implication; for that is not to alter the written instrument itself."

As where a fine is levied if no uses are declared, the resulting uses shall be to the conusor; but parol evidence is admissible to rebut the presumption of such resulting uses.

Roe v. Popham,
Dougl. 24.
Lord Altham v. Lord Anglesea,
cit. Dougl. 26.
Brady v. Cubitt,
Dougl. 30.

So the implied revocation of a will by a subsequent marriage and birth of a child, is liable to be rebutted by parol evidence.

So where a man devised four hundred pounds to his wife, and made her executrix without disposing of the surplus; Lord *Hardwicke*

Lake v. Lake,
8 Nov. 1753.
Bull. N. P. 297.
1 WILL. 313.

Vid. Walker v. Walker,
2 Atk. 98.

wicke admitted parol evidence to shew the testator meant his wife should have it; for there was no ambiguity in the will, nor was it to alter the apparent intent of the testator; for by law she was entitled to the surplus as executrix, and therefore the evidence was only to rebut the equity.

Brown v. Selwin, in Dom. Proc.
Bull. N. P. 297.

But in this case, the testator having expressly devised the residue of his personal estate to his executors, one of whom owed him money on bond, parol evidence was refused to be admitted, to prove the testator meant to extinguish the bond-debt, by making the obligor executor; for that would have been to alter the apparent intent, and not merely to rebut an equity.

Jones v. Newman,
Trin. 24 G. 2.
Bull. N. P. 296.
1 Black Rep. 60.
Chesney's case,
5 Co. S. P.

As where the testatrix devised her estate to her cousin *John Cleere*, and there was both father and son of that name; it was held that parol evidence was admissible to prove that the son of that name was the person meant; for as the objection arose from parol evidence, parol evidence ought to be admitted to answer it.

Vid. Thomas v. Thomas, 6 Term Rep. 671.

2 Roll. Ab. 676.

So if a man has two manors of the same name of *Dale*, and he levies a fine of the manor of *Dale* generally; parol evidence and circumstances may be given in evidence, to shew which manor he intended; for that would not be to contradict the record, but to support it.

Bull. N. P. 297.
Lord Walpole v. Lord Cholmondeley,
7 T. Rep. 138.

Ambiguitas patens is that which appears on the face of the deed or instrument, and is in fact an omission, and can therefore never be supplied by an averment; for that in effect would be to make that pass without deed, which the law appoints shall not pass without deed.

Baillis & Church v. Attorney-General,
29 Jan. 1714.

As where there was a devise in a will, but the devisee's name was totally omitted: it was held that parol evidence was inadmissible to shew who was meant; for that would be to add to a written instrument.

Doe ex dem. Small v. Atkin,
8 T. Rep. 147.

So parol evidence may be admitted to shew that the testator was deceived, by having one will obtruded on him in place of that which he meant to execute.

6. A sixth general rule of evidence is, "That in all cases where general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in collaterally."

2. "It therefore often becomes doubtful whether general character is so put in issue or not."

Clarke v. Perians,
27 July 1742,
Bull. N. P. 295.

In this case, which was a bill filed by a kept-mistress for an annuity, the defendant in his answer said, "That she was a woman of infamous character before Mr. *Perians* became acquainted with her;" this was holden to be a sufficient putting of her character in issue to enable the defendant to prove particular facts.

Lord Doneraile v. Lady Doneraile, in Dom. Proc. 1734,
Bull. N. P. 296.

But where to a bill brought by the wife, the husband in his answer said, "She had not behaved herself with duty and tenderness to him, as became a virtuous woman, much less his wife,"

wife;" this was holden not to put adultery in issue, so as to enable the husband to prove particular facts.

2. In *actions for criminal conversation*, the defendant may give in evidence particular facts of the wife's adultery with others, or having a bastard before marriage; for by bringing the action the husband puts her general character and behaviour in issue, and as the defendant may examine as to particular facts, *a fortiori* he may call witnesses to her general character.

Roberts v. Malkron,
Per Willes, C. J.
at Hereford,
1745.
Bull. N. P. 296.

3. In *criminal prosecutions*, where the defendant's character is put in issue by the prosecution, the prosecutor may examine to particular facts; for it is impossible without it to prove his charge.

Bull. N. P. 296.

An exception to this is the case of *indictments for barratry*, in which case the prosecutor cannot examine as to particular facts without giving previous notice of it to the defendant; for these prosecutions being commonly against attornies, whose profession it is to follow law-suits, and it is difficult to draw the line between that and acting as a barrator, it is therefore required that the defendant should know what particular facts are to be given in evidence, in order that he may be prepared to shew that he was fairly and professionally employed in those things.

Bull. N. P. 296.

But in other criminal cases the prosecutor cannot enter into the defendant's character, unless the defendant enable him so to do, by his calling witnesses in support of it, and even then *the prosecutor cannot examine to particular facts*; the general character of the defendant not being put in issue, but coming in collaterally.

Ibid.

4. In an ejectment by an heir at law, to set aside a will for fraud and imposition committed by the defendant, he shall not be permitted to call witnesses to prove his general good character.

Goodright ex dim. Farr v. Hicks, Winton Sum. Ass. 1789, Coram Buller, J.

But where a will is disputed as having been obtained by fraud, which fraud is imputed to the witnesses to it, evidence may be called as to the general good character of the witnesses, and the improbability of their being guilty of any fraud.

Doe ex d. Stephenfon v. Walker,
4 Esp. N. P. C.
50.

5. As to how far the characters of *witnesses* may be questioned on trials, it is settled,

1. If you will impeach the credit of a witness, you can only examine into his general character, and not to particular facts; for every man is supposed to be capable of supporting the one; but it is not likely he should be prepared to answer the other without notice: and unless his general character and behaviour be in issue, he has no notice.

Bull. N. P. 296.

But other witnesses may be called to impeach his credit respecting any matter relative to the issue; for whatever is material to the issue, each party must come prepared to prove or to deny.

Hardwell v. Jarman, Taunton Lent Ass. 1789, Coram Buller, J.

But a party shall never be permitted to bring general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a

Hastings's case,
Per Lord Thurlow, Chanc.
11 June 1789,

in Dom. Proc.
Bull. N. P. 297.
Bull. N. P. 297.

good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him.

But if a witness prove facts in a cause which make against the party who called him, yet the party may call other witnesses to prove that these facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness; but the impeachment of his credit is incidental and consequential only.

Per Curiam,
7 East, 110.

"The rule has been laid down again and again, that upon cross-examination to try the credit of a witness, only general questions can be asked. A witness cannot be asked as to any collateral independent fact merely with a view to contradict him."

Spencely *q. t.*
v. Willock,
7 East, 108.

Therefore in an action for usury, the witness having proved the usury, was asked as to other similar transactions in the loans of money, but not connected with the transaction on which the question of usury then arose, with a view to call witnesses to impeach his credit in his account of those transactions. — Lord Ch. J. Lord *Ellenborough* refused to allow the questions to be put; and afterwards, on a motion for a new trial, the Court held that they were not proper to be asked, and were rightly rejected.

Per Ashurst, J.
Taunton Sum.
Aff. 1773, after
consulting with
Baron Adams,
Bull. N. P. 297.

If a particular fact go to the competency of a witness, it may be proved by other testimony; as the copy of a record for perjury, felony, &c. so of an interest in a witness in the event of a cause: and whether he be interested or not, shall be decided by the judge.

9. Another rule of evidence is this, "That if the substance of the issue be proved, it is sufficient."

This rule depends upon ascertaining how far the words *modo & forma* used in joining issue is of the substance of the issue; for where it is so, it must be proved.

To ascertain this, an attention to the point really to be tried between the parties, seems to be the best rule.

Co. Litt. 281.

As in an action of waste for cutting *twenty asbes*, proof that the defendant cut *ten* is sufficient; for the issue is waste or no waste.

2 Roll. Ab. 706.

But if the issue be whether "*Lord Delawar demised*" or not? proof that *A. B.* who was *not then, but now, Lord Delawar*, is not sufficient; for whether he were *Lord Delawar* at the time of the demise is the issue.

But, however, the rule is thus laid down: 1st, That where the issue is joined on the point of the action, there *modo & forma* are mere form, and need not be proved.

Pone v. Skinner,
Hob. 72.

As where in *replevin* the defendant avowed the taking as a commoner, damage feasant, the plaintiff in bar said that *I. S.* was seised of an house and land whereto he had common, and had demised to him the 30th of March to hold from the feast of the Annunciation next before for a year; the defendant traversed the lease *modo & forma*: the jury found that *I. S.* made a lease on the 25th of March, to the plaintiff for one year; and

though

though this be not the same lease pleaded on account of the difference of the day, yet the plaintiff had judgment; for the substance of the issue is, Whether the plaintiff had such a lease, by force of which he might use the common? yet it must not depart altogether from the form of the issue, as if it had been found that he had a right of common *by lease from another* that would have been bad. Bull. N. P. 200.

2dly, "But where a collateral point in pleading is traversed, then *modo & forma* is of the substance of the issue, and must be proved." Co. Litt. 202.

As if a feoffment be alleged *by two*, and this is traversed *modo & forma*, and this is found the feoffment of *one*, there *modo & forma* is material. Ibid.

So if a feoffment be pleaded *by deed*, and it is traversed *absque hoc quod feoffavit modo & forma*, the jury cannot find a feoffment without deed. Ibid.

10. "The next rule of evidence to be observed is, that confessions or admissions made for the purpose of a compromise, or in confidence, are not to be admitted to be given in evidence."

Such are the confidential communications made by a client to his attorney. *Ante.*

And on the same principle, where the defendant was a foreigner, and in his communication with his attorney it became necessary to employ *an interpreter*, it was ruled by Lord Kenyon, That the interpreter was bound to equal secrecy with the attorney, and could not give evidence of what had so been communicated. Du Barre v. Livette, Peake, N. P. C. 77.

But in the above case was cited a case of *Rex v. Sparkes*, before Mr. Justice Buller, where on an indictment for a criminal offence, a confession made by the prisoner, who was a papist, to a Popish priest, was admitted in evidence, and the party on it convicted and executed.

So an admission of an hand-writing to a bill of exchange, upon which the action was brought, made pending a treaty for a compromise, was held not to be within the rule above laid down, as not going to the merits of the cause, and as being a matter capable of being easily proved by other means. Walbridge v. Kennison, Esp. N. P. Cas. 143.

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THE END.



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